Docket for 02-1238

No. 02-1238 Status: GRANTED
Vide 02-1386, 02-1405
Title: Jeremiah W. (Jay) Nixon, Attorney General of Missouri, Petitioner
v.
Missouri Municipal League, et al.
Docketed: February 24, 2003
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (01-1379)
Decision Date: August 14, 2002
Rehearing Denied: November 20, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 18 2003	Petition for writ of certiorari filed. (Response due March 26, 2003)
Mar 3 2003	Order extending time to file response to petition to and including April 28, 2003. This extension of time is granted for all respondents.
Apr 9 2003	Waiver of right of respondents Missouri Municipal League, et al. to respond filed. VIDED.
Apr 22 2003	Response Requested . (Due May 23, 2003)
Apr 22 2003	Brief amici curiae of Nebraska Cable Communications Association filed. VIDED.
May 19 2003	Response to petition from respondents Missouri Municipal League, et al. filed. VIDED.
May 22 2003	Brief amicus curiae of Sprint Corporation filed. VIDED.
May 23 2003	Brief amici curiae of United States Telecom Association and Verizon filed. VIDED.
May 23 2003	Brief amici curiae of City of Abilene, Texas, et al. filed. VIDED.
Jun 23 2003	Petition GRANTED. This case is consolidated with 02-1386 and 02-1405 and a total of one hour is allotted for oral argument.
Jul 24 2003	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including September 8, 2003. Extension of time within which to file respondents' brief on the merits to and including October 24, 2003.
Aug 4 2003	Motion to dispense with printed appendix filed by petitioner FCC. VIDED.
Aug 25 2003	Motion to dispense with printed appendix filed by petitioner GRANTED.
Sep 8 2003	Brief of petitioners Southwestern Bell Telephone, L.P., fka Southwestern Bell Telephone Co. filed. VIDED.
Sep 8 2003	Brief of petitioner FCC and the United States filed. VIDED.
Sep 8 2003	Brief amicus curiae of Sprint Corporation filed. VIDED
Sep 8 2003	Brief of petitioner Jeremiah W. (Jay) Nixon, Attorney General of Missouri filed. VIDED.
Sep 8 2003	Brief amici curiae of United States Telecom Association and Verizon, et al. filed. VIDED
Oct 24 2003	Brief amicus curiae of Knology, Inc. filed. VIDED.
Oct 24 2003	Brief of respondents Missouri Municipal League, et al. filed. VIDED.
Oct 24 2003	Brief amici curiae of International Municipal Lawyers Association, et al. filed. VIDED.
Oct 24 2003	Brief amici curiae of High Tech Broadband Coalition, et al. filed. VIDED.
Oct 24 2003	Brief amici curiae of City of Abilene, Texas, et al. filed. VIDED.
Oct 24 2003	Brief amicus curiae of Virginia Localities filed. VIDED.
Oct 24 2003	Brief amicus curiae of Lincoln Electric System filed. VIDED.

Oct 24 2003	Brief amicus curiae of Consumer Federation of America filed. VIDED.
Oct 24 2003	Brief amicus curiae of United Telecom Council filed. VIDED.
Oct 24 2003	Brief amicus curiae of Rick Boucher filed. VIDED.
Oct 24 2003	Brief amicus curiae of EDUCAUSE filed. VIDED.
Nov 3 2003	SET FOR ARGUMENT Monday, January 12, 2004.
Nov 4 2003	CIRCULATED.
Nov 6 2003	Motion for divided argument filed by petitioner Solicitor General. (VIDED)
Nov 17 2003	Motion for divided argument filed by petitioner GRANTED.
Nov 18 2003	Record received from the U.S.C.A. for the 8th Circuit. (1 envelope)
Nov 28 2003	Reply of Federal petitioners filed. VIDED. (Distributed)
Nov 28 2003	Reply of petitioner Southwestern Bell Telephone, L.P. filed. (Distributed) (VIDED).
Nov 28 2003	Reply of petitioner Jeremiah W. Nixon, Attorney General of Missouri filed. VIDED. (Distributed)
Dec 16 2003	Record received from the Fedederal Communications Commission. (2 boxes)
Jan 12 2004	Argued. For federal petitioners: James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For petitioner Nixon: Ronald Molteni, Assistant Attorney General, Jefferson City, Mo. For respondents: David A. Strauss, Chicago, Ill.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ___

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

Jeremiah W. (Jay) Nixon, Attorney General
State of Missouri,

Petitioner,

v.

Missouri Municipal League, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTION PRESENTED

In enacting 47 U.S.C. § 253(a), which bars the states from prohibiting "any entity" from providing intrastate or interstate telecommunications services, did Congress clearly and manifestly deprive the states of the ability to bar their own political subsidiaries from entering the telecommunications business?

PARTIES TO THE PROCEEDING

Petitioner is the State of Missouri, which appeared at the Federal Communications Commission and intervened in the court of appeals. Southwestern Bell Telephone, L.P., also intervened below. Respondent below was the Federal Communications Commission. The petitioner below was the Missouri Municipal League, which is the respondent here.

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No. ___

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2002

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL
STATE OF MISSOURI,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The State of Missouri, through its Attorney General, Jeremiah W. (Jay) Nixon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit restricting the State's ability to define the authority of its own political subdivisions.

Opinions Below

The opinion of the court of appeals (Appendix ("App.") A-2 through A-13), filed August 14, 2002, is reported at 299 F.3d 949 (8th Cir. 2002). The court of appeals' order denying rehearing, entered November 20, 2002, appears in the appendix at A-14. The opinion of the Federal Communications Commission (App. A-15 through A-32) is reported at 16 F.C.C.R 1157 (2001).

Jurisdiction

The court of appeals entered its judgment on August 14, 2002. That court denied rehearing on November 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Constitution of the United States, Article VI, cl. 2:

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding

47 U.S.C. § 253(a):

(a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Mo. Rev. Stat. § 392.410.7 (1997):

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;
(2) For 911, E-911 or other emergency services;
(3) For medical or educational purposes;
(4) To students by an educational institution;
(5) Or Internet type services.

The provisions of this subsection shall expire on August 28, 2002.[1]

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[1] Though the statute as considered by the Federal Communications Commission would have expired in August, 2002, the statute's life was extended by the Missouri General Assembly in earlier 2002. Truly Agreed to and Finally Passed Conference Committee Substitute for House Bill No. 1402, 91st General Assembly. The concluding sentence now reads, "The provisions of this subsection shall expire on August 28, 2007." Mo. Rev. Stat. § 392.410.7 (Supp. 2002). *See* A-5, n.7.

INTRODUCTION AND STATEMENT

Using a wide variety of models, states create a range of political subdivisions. As the sovereign, each state dictates what each subdivision can and cannot do. This case presents a direct conflict between two courts of appeals – reflected in decisions by two state supreme courts, and in decisions by a state court of appeals and a federal district court – regarding whether Congress has appropriated the States' ability to define the authority of their subdivisions. In the decision below, the U.S. Court of Appeals for the Eighth Circuit held that Congress authorized any subdivision of the State of Missouri to engage in the telecommunications business – despite express provisions of state law that preclude such activities.

In 1997, the Missouri General Assembly enacted §392.410.7, Mo. Rev. Stat. (1997). Section 392.410.7 restricts the authority of political subdivisions of the State of Missouri from providing or offering for sale the kind of telecommunications service for which a certificate of service authority is required. Section 392.410.7 states that it shall not be construed to restrict a political subdivision from allowing nondiscriminatory use of its rights of way or from providing certain kinds of telecommunications services or facilities such as those for its own use, for emergency services, medical or educational purposes, or Internet type services. But the General Assembly decided that it is not appropriate for State subdivisions – whether they be cities, counties, school districts, fire protection districts, levee districts, or some other organization – to become telecommunications providers.

That statute was attacked by the Missouri Municipal League and a handful of municipal utilities (collectively the "Missouri Municipals") in a petition filed on July 8, 1998, with the Federal Communications Commission. The Missouri Municipals claimed that § 392.410.7 is preempted by 47 U.S.C.

253(a). Section 253(a), a part of the Federal Telecommunications Act of 1996, bars state or local laws from prohibiting or having the effect of prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service."

Litigation regarding the preemptive impact of § 253(a) was already underway in a parallel case involving Texas law. On October 1, 1997, the FCC denied the City of Abilene's request to declare that certain Texas statutes, §§ 54.001, 54.201-.202 Tex. Util. Code, were preempted by § 253(a). *See* 13 F.C.C.R. 3460 (1997). Those statutes prohibit municipalities from obtaining certificates to provide telecommunications services or from selling those services, directly or indirectly, to the public. On January 5, 1999, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision not to preempt the Texas statutes. *City of Abilene, Texas v. Federal Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999). The D.C. Circuit agreed with the FCC that the principles asserted by this Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), regarding Supremacy Clause review of state statutes preclude finding that § 253(a) preempts a state's governance of its own political subdivisions. Only when Congress manifests its intention with "unmistakable clarity" should federal law be interpreted to reach into areas of state sovereignty. 164 F.3d at 52 (citing *Gregory*, 501 U.S. at 460.) Congress was not unmistakably clear in its use of the term "any entity" in 47 U.S.C. 253(a), and accordingly, 47 U.S.C. § 253(a) fails the clarity test. 164 F.3d at 52. It thus does not preempt a state law that prohibited the state's own municipalities from providing telecommunication services. *Id.* at 52.

On January 12, 2001, the FCC issued its order regarding the Missouri Municipals petition. App. A-15 through A-32, 16 F.C.C.R. 1157 (2001). The FCC followed the course it and the D.C. Circuit had taken *City of Abilene*. The FCC determined that *Gregory* precludes it from preempting § 392.410.7,

because, again, the term "any entity" in Section 253(a) does not unmistakably include political subdivisions. A-25.

The Missouri Municipals petitioned for review in the U.S. Court of Appeals for the Eighth Circuit pursuant to 47 U.S.C. § 402(a), 5 U.S.C. § 706(2)(A), 28 U.S.C. §§ 2342 and 2344, and Fed. R. App. P. 15(a). The Eighth Circuit expressly rejected the holding of the D.C. Circuit in *City of Abeline*, A-11, and reversed and remanded the underlying case to the FCC with the mandate that the FCC include municipalities and political subdivisions among those whose authority is protected from state action by § 253, A-13. Thus the FCC is subject to two conflicting mandates. And Missouri is barred from regulating the telecommunications efforts of "any entity" that it has created or may create. Texas, by contrast, remains free to regulate its political subdivisions. Except to the extent they have already litigated the question in lower federal or state courts, states outside the Eighth Circuit and Texas do not know what they can do. And no one really knows the extent to which Congressional use of general language suffices to remove some portion of the States' sovereignty.

REASONS TO GRANT THE WRIT

I. Section 253(a) can curtail the states' sovereignty by depriving the states of their ability to reign in the activities of their own political subdivisions only if Congress there used "unmistakably clear" language.

This case goes to the essence of our system of "dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918 (1996) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviable sovereignty." The Federalist No. 39 at 245 (J. Madison). In recent years, this court has repeatedly declared that the States retain that sovereignty in the face of congressional acts that assail it. *E.g.*, *Printz v. United States*, 521 U.S. at 918. *Also see FMC v. S.C. State Ports Authority*, 535 U.S. 743 (2002); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

In a long line of cases, this Court has demanded of Congress more than generalities when it limits state sovereignty. For example, in 1947, the Court recognized that when courts consider federal laws that affect the States' historic powers, they are to find those powers to have been removed only when that "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947). In 1985, the Court noted its recent "reiterat[ion] that 'States occupy a special and specific position in our constitutional system,'" and that the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Auth.* 469 U.S. 528, 547

(1985)). Four years later, the Court considered a congressional declaration as broad as the one at issue here: the application of 18 U.S.C. § 1983 (1979) to "every person." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The court held that "every person" did not include a state, again demanding that Congress "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.*, quoting *Rice*, 331 U.S. at 230. Two years later, the court quoted *Atascadero* and *Will* with approval in *Gregory v. Ashcroft*. 501 U.S. at 460-461.

The now well-established *Gregory v. Ashcroft* standard is that generalities are insufficient when Congress is acting in a realm that "alter[s] the usual balance between the States and the Federal Government." *Atascadero*, 473 U.S. at 242, quoted with approval in *Gregory*, 501 U.S. at 460. In those instances, courts are to find that the States' sovereignty has been limited only when Congress has made "its intention to do so 'unmistakably clear in the language of the statute.'" 501 U.S. at 460, quoting *Atascadero*, 473 U.S. at 242. *See also See e.g., California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997); *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

No one, in any of the cases addressing the application of 47 U.S.C. § 253(a) to state subdivisions, has made the foolish argument that setting the bounds on political subdivisions is anything but a core function of state sovereignty. Nor has anyone questioned whether the States' authority extends to determining whether, how, and where state subdivisions can operate utilities. Indeed, the power to own, maintain, and operate public utilities, such as waterworks, gas and electric plants, steel railway systems, public markets, and the like, is frequently conferred by the States upon their cities and other political subdivisions. For the purpose of carrying on such

activities, they are given power to hold and manage personal and real property. But "[t]he number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Hunter v. Pittsburg*, 207 U.S. 161, 178, 179 (1907), quoted with approval in *City of Trenton v. New Jersey*, 262 U.S. 182, 186-187 (1923). Nor has anyone in any of the cases questioned whether Congressional interference with the states' ability to define the authority of their subdivisions engaged in providing utilities "alters the balance between the States and the Federal Government." *Atascadero*, 473 U.S. at 242.

Instead, in each of the cases addressing § 253(a)'s application to the States, the parties have posed the correct question: did Congress, in § 253(a), "clearly and manifestly" deprive the states of the right to regulate their own subsidiaries? But the lower courts are hopelessly divided in their answers to that question.

II. Courts have reached diametrically opposed decisions regarding whether the generality, "any entity," is "unmistakably clear."

In cases challenging decisions by the FCC, the Courts of Appeals for the D.C. Circuit and the Eighth Circuits have issued diametrically opposed interpretations of the very same language in 47 U.S.C. § 253(a).

In *City of Abilene*, the D.C. Circuit recognized that the phrase "any entity" as it appears in 47 U.S.C. § 253(a) is broad enough to conceivably cover state entities such as municipalities. 164 F.3d at 52-53. But the D.C. Circuit also recognized that the test is not whether the phrase could cover municipalities, but whether Congress has manifest its intention with

unmistakable clarity. *Id.* at 52. The court held that such a broad generality was insufficient under the *Gregory v. Ashcroft* standard, and therefore affirmed the FCC order. Thus municipalities in Texas are still barred from entering the telecommunications business.

The Eighth Circuit reaches the precise opposite conclusion. The Eighth Circuit acknowledges the *City of Abilene* holding. A-11. But the court concludes that the term "any entity" on its face includes political subdivisions of a state. A-8. In that court's view, the use of a broad, general description like "any" is sufficient to make the coverage of state subdivisions "clear and manifest." A-9. The Eighth Circuit reverses the FCC order and declares that § 392.410.7, RSMo. is preempted – despite the fact that with regard to municipalities, the Missouri statute is similar to and even less restrictive than the Texas statute upheld by the D.C. Circuit.

Thus in Missouri and the other states in the Eighth Circuit, political subdivisions, including cities, are free to ignore state limitations on their authority that prevent them from entering the telecommunications business. Texas cities, by contrast, cannot exceed the boundaries the Texas legislature has set. And the FCC is caught between a rock and a hard place: it is bound, theoretically, by both the Eighth Circuit's holding that "any entity" includes the states' political subdivisions, and the D.C. Circuit's holding that "any entity" does not include them.

The split is shown not just in *City of Abilene* and the decision below, but in other decisions on the same point.

Ironically, two of the conflicting decisions come from Eighth Circuit states. Before the Eighth Circuit decided this case, but after the D.C. Circuit decided *City of Abilene*, the Iowa Supreme Court upheld state restrictions on telecom-

munications businesses to be operated by cities. *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W. 2d 245 (Iowa 1999). The City of Hawarden "intend[ed] to provide land-line local telephone services to customers located within and outside of its municipal corporate limits." *Id.* at 248. The Iowa court rejected the city's argument that paralleled the argument made by the Missouri Municipals here. *Id.* at 252. The court held that the phrase "any entity" did not provide "a clear indication" of congressional intent to remove a power that "has traditionally been within the purview of the states." *Id.* Thus cities in Iowa face a state supreme court decision that affirms the state's ability to regulate their authority *and* an Eighth Circuit decision that erases that same authority. But in another Eighth Circuit State, Nebraska, the highest court took precisely the opposite approach. *In re Application of Lincoln Electric System*, 655 N.W. 2d 363 (Neb. 2002).[2]

Two courts in other circuits have also recently decided the question – and mirrored the Eighth/D.C. Circuit, and Iowa/Nebraska conflict. In *City of Bristol v. Earley*, a U.S. district court held that including political subdivisions among "any entities" is a "'straightforward statutory command.'" 145 F. Supp. 2d 741, 748 (W.D. Va. 2001) (quoting *United States v. Gonzalez*, 520 U.S. 1, 6 (1997)). That court mentioned, but rejected, *City of Abilene*, *Iowa Telephone*, the FCC's decision in this case, and a Georgia case, *Municipal Electric Authority of Georgia v. Georgia Public Service Commission*, 525 S.E. 2d

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[2] The Nebraska court also considered a parallel question: whether a political subdivision might not be prohibited from entering the telecommunications business, but might nonetheless lack authority to enter that business. *Id.* at 372. The court did not have to reach that question because it concluded that the subdivisions involved did have such authority under state law.

399 (Ga. App. 1999). In *Municipal Electric*, the Georgia court followed the D.C. Circuit's holding that "any entity" is so broad as to be "vague," and thus it did not constitute "a clear expression of congressional intent" sufficient to overrule the state's power to regulate the authority of its own subsidiaries. 525 S.E.2d at 403. Thus cities in Virginia can enter telecommunications businesses while cities in Georgia cannot – again, based on conflicting interpretations of § 253(a).

Given the stark contrast between these lines of precedent, the competitive interests involved,[3] and the number of other states that have similar statutes[4] yet to be tested, it is certain that even in the narrow context of § 253(a), the impact of this conflict will grow.

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[3] *See* K. Tongue, "Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers," 95 NW. U.L. REV. 1099 (2001); R. Kawar, "Competing with City Hall: Local Government Entry into the Telecommunications Marketplace," 17 COMPUTER & HIGH TECH L.J. 169 (2000).

[4] Among them, in addition to the six where validity has already been litigated, are Arkansas (Ark. Code § 23-17-409), Florida (Fla. Stat. §§ 125.421, 166.047, 196.012, 199.183, and 212.08), Minnesota (Minn. Stat. Ann. § 237.19), Nevada (Nevada Statutes § 268.086), and Tennessee (Tennessee Code Ann. § 7-52-601 et seq.).

III. The conflict among courts determining how specific congressional langauge must be to carve out a portion of the sovereign states' authority to define the powers of their own subdivisions merits the attention of this court.

Congress frequently works along the edges of state sovereignty. It less often crosses the line. And it seldom steps so far across the line that it deprives the states of the ability to define the scope of authority of subdivisions the states themselves create and – absent such congressional action – control. Here, the courts disagree as to whether Congress takes such a step merely by using a broad term like "any entity." The use of broad terms in federal statutes is certainly not unusual – indeed, "any entity" is used elsewhere in the United States Code, though, fortunately, with more definition than § 253(a) provides. *E.g.*, 7 U.S.C. § 87(b)(2); 11 U.S.C. §§ 557(g)(1), 1126(c); 18 U.S.C. § 2702(a); 33 U.S.C. § 1502(2); 42 U.S.C. § 12818(6); 47 U.S.C. § 303c(b)(2). So is "any person." *E.g.*, 15 U.S.C. § 13a; 14 U.S.C. § 89g-2(a); 17 U.S.C. § 506(a). *See also Will v. Michigan Dept. of State Police*, 491 U.S. at 65 ("every person" as used in 18 U.S.C. § 1983 does not include the States, though it does include municipal corporations).

In light of the conflict between the line of cases represented by *City of Abilene* and the line represented by the decision below, the States do not know what to look for as they review proposed federal legislation to determine its likely impact. Is a generality like "any entity," "any person," or "every person" sufficient to warn the States that a portion of their sovereignty is at risk? Or does Congress have to say something more when it carves a piece out of the States' sovereignty? The answer should not depend on geography.

And it should not depend on manipulation of the jurisdiction of the various federal circuits. The D.C. Circuit is

available as a venue on appeal not just from orders of the FCC pursuant to 28 U.S.C. § 2343, but also on appeal from orders of other administrative officers and agencies. *See* 28 U.S.C. §§ 2341(3) and 2343 (The same option applies to appeals from the Federal Maritime Commission, the Atomic Energy Commission, the Secretary of Agriculture, the Secretary of Transportation, and the Surface Transportation Board.). Thus a state that wants to retain its sovereignty despite a general term like "any entity" will want to lose at the agency and appeal to the D.C. Circuit, while the party wanting to assert a broad congressional usurpation of state authority will want to lose at the agency level and choose the regional court of appeals.

This fundamental question of federal power should not rest on the losing party's choice of venue. There should be one clear, consistent rule. Given the disagreement among the lower courts, such a rule is only available from this Court.

CONCLUSION

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

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February 18, 2003

No. ___
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

Jeremiah W. (Jay) Nixon, Attorney General
State of Missouri,

Petitioner,

v.

Missouri Municipal League, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S APPENDIX

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In the Matter of The Missouri Municipal League, Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, 16 F.C.C.R 1172 (2001) A-15

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1379

The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston, Missouri; Columbia Water & Light; American Public Power Association,	*	
Petitioners,	*	Petition for Review of an Order of the Federal Communications Commission.
v.	*	
Federal Communications Commission United States of America,	*	
Respondents,	*	
Southwestern Bell Telephone Company;	*	
State of Missouri,	*	
Intervenors on Appeal.	*	
National Association of Telecommunications Officers and Advisors; United Telecom Council,	*	
Amici on Behalf of Petitioners.	*	

Filed: August 14, 2002

Before WOLLMAN,[5] Chief Judge, BOWMAN, and STAHL,[6] Circuit Judges.

WOLLMAN, Chief Judge.

Various Missouri municipalities, municipal organizations, and public power companies (the Missouri Municipals) have petitioned for review of the Federal Communications Commission's (Commission) order denying the Missouri Municipals' petition to preempt a Missouri statute that prevents municipalities and municipally owned utilities from providing telecommunications services or telecommunications facilities. We vacate the order and remand to the Commission for further consideration.

I.

In February 1996, Congress enacted the Telecommunications Act of 1996 (the Act), which extensively amended the Communications Act of 1934, 47 U.S.C.A. §§ 151-615 (West 2001). The Act's intended purposes are to

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[5] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[6] The Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

increase competition in the area of telecommunications services and to ensure the delivery of universal provides for "removals of barriers to entry," as follows:

> (a) In general
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> . . .
>
> (d) Preemption
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C.A. §253 (West 2001 Supp.).

Section 392.410(7) of the Revised Statutes of Missouri prohibits the state's political subdivisions from obtaining the certificates of service authority necessary to provide tele-communications services or facilities directly or indirectly to the public. It provides:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities;
> (1) For its own use;
> (2) For 911, E-9 11 or other emergency services;
> (3) For medical or educational purposes;
> (4) To students by an educational institution; or
> (5) Internet-type services. The provisions of this subsection shall expire on August 28, 2002. Mo. Rev. Stat. § 392.4 10(7) (West 2001 Supp).[7]

---

[7] Missouri House Bill 1402, 2002 Mo. Legis. Serv. H.B. 1402 (Vernon's), signed into law on July 11, 2002, extended the expiration date to August 28, 2007, as well as making certain

The Missouri Municipals filed a petition with the Commission, asking that it preempt Mo. Rev. Stat. § 392.410(7) as being in violation of § 253(a) of the Act. The Commission employs a two-step process in examining statutes under § 253. First, it determines whether the statute violates § 253(a). If it does, then the Commission considers whether the statute falls within the reservation clause of § 253(b). If it does not, then the Commission must preempt the statute. Finding that the Missouri statute does not violate § 253(a), the Commission denied the petition, thus eliminating the need for § 253(b) review. In the matter of the Missouri Municipal League, 16 F.C.C.R. 1157 (2001). The Commission expressed its disagreement with the policy of the Missouri statute because it had found previously that "municipally-owned utilities . . . have the potential to become major competitors in the telecommunications industry . . . [and] can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small rural communities." Id. at 1162; see also id. at 1173 (Separate Statement of Commissioner Susan Ness). Even though it expressed its desire that states not adopt the type of complete barriers to entry found in § 392.4 10(7), the Commission felt bound by legal authorities not to preempt the statute, particularly a decision of the United States Court of Appeals for the District of Columbia, City of Abilene v. FCC, 164 F.3d 49 (D.C. Cir. 1999). Missouri Municipal League, 16 F.C.C.R. at 1164-65; see also id. at 1172 (Separate Statement of Chairman William E. Kennard and Commissioner Gloria Tristani); and id. at 1173 (Separate Statement of Commissioner Susan Ness). The Missouri Municipals then filed a petition for a review of the Commission's order. Southwestern Bell Telephone Co. and

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other changes in the wording of § 392.410(7), none of which affect our analysis in this case.

the State of Missouri intervened in support of the Commission's decision.

We have jurisdiction to review final orders of the Commission under 47 U.S.C.A. § 402(a) (West 2001) and 28 U.S.C.A. § 2342(1) (West 1994).

II.

We review agency determinations under the two-step process set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we must defer to a reasonable interpretation of the statutory provision made by the agency. Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 936 (8th Cir. 2000), affd, 122 S.Ct. 1155 (2002).

A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). In Gregory, the Court "confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers. . . [and] concluded that, absent a clear indication of Congress's intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." Salinas v. United States, 522 U.S. 52, 59 (1997). As the Court pointed out in Salinas, however, a "statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading

the Act" that Congress intended to alter the federal-state balance in the relevant area. Id. at 60 (quoting Gregory, 501 U.S. at 467). Thus, the Gregory plain-statement rule does not require courts to limit a statute's scope where Congress's intent is plain, and, in fact, "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." Salinas, 522 U.S. at 60 (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)).

In summary, the Gregory rule requires us to determine whether the statutory language plainly requires preemption. Gregory does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. We do not assume that Congress exercises its Supremacy Clause power lightly, however, and we must be "certain of Congress' intent" before we find that federal law overrides the balance between state and federal powers. Gregory, 501 U.S. at 460. Even so, no matter how great the state interest, we should not strain to create ambiguity in a statute where none exists. See Salinas, 522 U.S. at 59-60. Accordingly, we ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law.

The dispute hinges on the meaning of the phrase "any entity" in § 253 of the Act. More precisely, do the words "any entity" plainly include municipalities and so satisfy the Gregory plain-statement rule? We hold that they do. Accordingly, because § 253 satisfies the Gregory plain-statement rule, it also satisfies Chevron's clear-statement rule and thus the Commission's contrary interpretation cannot stand.

We begin with the language Congress used, and,

because the statute does not define the term "entity," we presume that "the ordinary meaning of that language accurately expresses the legislative purpose." Morales v. Trans World Airlines. Inc., 504 U.S. 374, 383 (1992); see also Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995). There is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term. An entity is "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." Black's Law Dictionary 553 (7th ed. 1999). Although municipalities in Missouri derive all of their powers from the state, and although a state can control its subdivisions in an almost limitless way, see e.g., Sailors v. Bd. of Educ., 387 U.S. 105, 107-08 (1967), municipalities and other political subdivisions have an existence separate from that of the state. It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Furthermore, Congress's use of "any" to modify "entity" signifies its intention to include within the statute all things that could be considered as entities. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." United States v. Gonzales, 520 U.S. 1, 5 (1997) (citations omitted). Time and time again the Court has held that the modifier "any" prohibits a narrowing construction of a statute. See Dep't of Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230, 1233 (2002) (in statute requiring lease term providing for lease

termination if public housing tenant or specified others engage in "any drug-related criminal activity," Congress's "use of the term 'any' to modify 'drug-related criminal activity' precludes" limiting the statute to cover only "drug-related activity that the tenant knew, or should have known, about"); Brogan v. United States, 522 U.S. 398,400-01, 405 (1998) ("any false, fictitious or fraudulent statement" includes false statements of whatever kind); Gonzales, 520 U.S. at 5 ("any other term of imprisonment" means all prison sentences, both state and federal, where Congress did not add any language limiting the breadth of the term "any"); Freytag v. Comm'r, 501 U.S. 868, 873-74 (1991) ("any other proceeding" allows Chief Judge to assign all types of cases to a special trial judge); United States v. James, 478 U.S. 597, 605 (1986) ("any damage" and "liability of any kind" include all possible damages from a government project, not limited to just property damage); United States v. Turkette, 452 U.S. 576, 580-81 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-89 (1980) ("any other final action" includes all actions that constitute the agency's last word); and Bhd. of RR Trainmen v. Balt. & O. R. Co., 331 U.S. 519, 529 (1947) ("any proceeding arising under this Act" allows intervention in all cases under the statute); accord Southern Co. v. FCC, No. 99-15160, 2002 WL 1299142 at *10 (11th Cir. June 13, 2002) (plain meaning of "any" is "all" unless specifically limited in statute).

In Salinas v. United States, the Court was called upon to decide whether the federal bribery statute, which applies to "any business transaction," applies only to bribes affecting federal funds. The defendant, who had bribed a state official, argued that because the bribery statute upset the federal-state balance, the Gregory plain statement rule required a plain statement of congressional intent that the bribery statute apply to bribes having no effect on federal funds. In holding

that the bribery statute included bribes of state officials, even where no federal funds were affected, the Court stated that "the word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." Salinas, 522 U.S. at 57. The Court also stated that "the plain-statement requirement articulated in Gregory . . . does not warrant a departure from the statute's terms." Id. at 60.

In City of Abilene v. FCC, the Court of Appeals for the District of Columbia reviewed a Commission order that refused to preempt a Texas statute similar to Mo. Rev. Stat. § 392.410(7), holding that § 253 did not contain a plain statement sufficient to preempt a traditional area of state sovereignty. With all due deference to our sister circuit's holding, and mindful of our desire to maintain uniformity among the circuits, United States v. Auginash, 266 F.3d 781, 784 (8th Cir. 2001), we do not find City of Abilene to be persuasive. The D.C. Circuit noted that the mere possibility that the term "entity" could include municipalities does not satisfy Gregory. City of Abilene, 164 F.3d at 52-53. The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. Id. at 52. Counsel for the Commission stated at oral argument that the D.C. Circuit did not consider Salinas because of that court's rules regarding cases not cited in the original briefs. Whatever the reason for the D.C. Circuit's decision not to consider and discuss Salinas and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no reference in any of the Supreme Court's decisions regarding the word "any" about

Congress's "tone of voice" and "emphasis." We note that a district court in Virginia, after considering both the "any" cases and City of Abilene, concluded that "any entity" should be read broadly and held that a Virginia statute similar to Mo. Rev. Stat. § 392.410(7) must be preempted. City of Bristol v.Earley, 145 F.Supp.2d 741, 747-49 (W.D. Va. 2001) ("it strains logic to interpret the term 'any entity' in § 253(a) to mean 'any entity except for municipalities and other political subdivisions of states").

Accordingly, we conclude that because municipalities fall within the ordinary definition of the term "entity," and because Congress gave that term expansive scope by using the modifier "any," individual municipalities are encompassed within the term "any entity" as used in § 253(a). This language would plainly include municipalities in any other context, and we should not hold otherwise here merely because § 253 affects a state's authority to regulate its municipalities. Congress need not provide specific definitions for each term in a statute where those terms have a plain, ordinary meaning and Congress uses an expansive modifier to demonstrate the breadth of the statute's application. See Gregory, 501 U.S. at 467 (statute need not explicitly mention judges to have judges included in the definition); Salinas, 522 U.S. at 60 (statute need not address every interpretive theory offered in order to be unambiguous).

We recognize Missouri's important interest in regulating its political subdivisions. The Gregory standard is designed to respect such interests. That Salinas was a criminal case in which the state had no interest in allowing its officials to take bribes does not detract from its fundamental holding regarding the authority of Congress to change the balance of state and federal powers when it employs plain language to do so. Salinas held that by using the clearly expansive term "any," Congress expressed its intent to alter

this relationship. We conclude that the same must be said about the preemption provision set forth in § 253.

Missouri also argues that because the state controls its municipalities' authority, § 253 does not apply to this case. Section 253 directs the Commission to preempt laws that prohibit "the ability of any entity" to provide telecommunications services. Missouri argues that because § 392.410(7) addresses its municipalities' authority to provide telecommunications services rather than their ability to do so, § 253 does not apply. Missouri contends that if § 392.410(7) is held to be preempted, it would not be able to prevent its attorney general's office from providing telecommunications services. Putting aside the highly fanciful nature of this argument, it needs only to be noted that unlike municipalities, the Missouri Attorney General's office has no independent authority to provide telecommunications services. Section 392.410(7) is a prohibition on the ability to exercise the authority that municipalities otherwise possess, precisely the type of prohibition that § 253 is designed to prevent. See City of Bristol, 145 F.Supp.2d at 748 (Virginia municipalities otherwise have authority to provide telecommunications services and state statute designed to prohibit them from exercising that authority preempted by § 253).

The Commission's order is vacated, and the case is remanded to the Commission for further proceedings consistent with the views set forth in this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1379

The Missouri Municipal League, et al.,	*	
Petitioners,	*	Order Denying Petition for Rehearing and for Rehearing En banc
v.	*	
Federal Communications Commission,	*	
Respondents,	*	
Southwestern Bell Telephone Co., et al.,	*	
Intervenors on Appeal.	*	

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge McMillian and Judge Loken took no part in the decision in this matter.
(5128-010199)

November 20, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. court of Appeals, Eighth Circuit

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of The Missouri Municipal League;
The Missouri Association of Municipal Utilities;
City Utilities of Springfield;
City of Columbia Water & Light;
City of Sikeston Board of Utilities.

CC Docket No. 98-122

Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2000
Released: January 12, 2001

By the Commission: Chairman Kennard and Commissioner Tristani issuing a joint statement; Commissioner Ness issuing a separate statement.

I. Introduction

1. On July 8, 1998, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities (collectively, the Missouri Municipals), on behalf of themselves and more than 600 municipalities and 63 municipal electric utilities located in Missouri, filed the above-captioned petition (Petition) asking the Commission to preempt Section 392.410(7) of the Revised Statutes of Missouri (HB 620), and declare it unlawful and unenforceable. Several parties filed comments

and reply comments addressing the petition. The Missouri Municipals assert that HB 620 violates section 253(a) of the Communications Act of 1934, as amended, and falls outside the scope of authority reserved to the states by section 253(b) of the Act, and thus satisfies the requirements for preemption by the Commission pursuant to section 253(d) of the Act.

2. For the reasons described below, we do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state, from providing telecommunications services or facilities. The Commission has found previously that political subdivisions of a state, such as a municipality, are not "entities" under section 253(a) of the Act. We find that, under Missouri law, municipally-owned utilities are generally part of the municipality, itself, and are therefore not separate and apart from the state of Missouri, and are not entities subject to section 253(a). We do find, however, that if a municipally-owned utility has an independent corporate identity that is separate from the state, it can be considered an entity for which section 253 preemption is available.

II. BACKGROUND

3. The Missouri Municipals seek preemption of HB 620 pursuant to section 253 of the Communications Act, which Congress enacted to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition. In assessing whether to preempt enforcement of HB 620 pursuant to section 253, we first determine whether the statute is proscribed by section 253(a), which states that no state or local requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." If we find that HB 620 is proscribed by section 253(a) standing alone, we must then determine

whether it falls within the reservation of state authority set forth in section 253(b), which excludes from the scope of the Commission's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in section 253(b). If a law, regulation or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement "to the extent necessary to correct the violation" in accordance with section 253(d). This is the approach that the Commission has taken in prior orders addressing section 253.

4. On August 28, 1997, the General Assembly of Missouri enacted HB 620, which replaced certain provisions of Missouri's telecommunications statute regarding the issuance of certificates of public convenience and necessity for the provision of telecommunications service. With certain limited exceptions, it prohibits political subdivisions from obtaining a certificate of service authority to provide telecommunications services or facilities. The statute states: No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;
(2) For 911, E-911 or other emergency services;
(3) For medical or educational purposes;
(4) To students by an educational institution;

(5) Or Internet type services.

The provisions of this subsection shall expire on August 28, 2002.

5. HB 620 is similar to a Texas statute that the Commission declined to preempt. In the Texas Preemption Order, the Commission found that a provision of the Texas Public Utility Regulatory Act of 1995 ("PURA95") that prohibited municipalities from providing telecommunications services did not violate section 253(a). Ruling on a petition for preemption of section 3.251(d) of PURA95 filed by the City of Abilene, Texas, the Commission stated that the City of Abilene was not an "entity" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. It found that preempting the enforcement of the Texas statute would insert the Commission "into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." The Commission reasoned that Texas retains substantial sovereign power to decide what activities to authorize its political subdivisions to undertake. With regard to such fundamental state decisions, the Commission stated that it must adhere to the standard in Gregory v. Ashcroft, in which the Supreme Court held that a court must not construe a federal statute to preempt traditional state powers unless Congress has made its intention to do so unmistakably clear in the language of the statute.

6. In the Texas Preemption Order, the Commission determined that because section 253(a) is directed at requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, it appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself. The Commission found that if it construed the term "entity" in section 253(a) in this context to include municipalities, it would prevent states from prohibiting their political

subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects. The Commission did not find a clear indication of Congressional intent in section 253 to intervene in this state-local relationship as it affected municipalities, but expressly declined to address the issue of whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.

7. The City of Abilene sought judicial review of the Texas Preemption Order before the Federal Court of Appeals for the D.C. Circuit. The D.C. Circuit upheld the Commission's interpretation of Section 253. Citing Gregory, the court held that the text of section 253 is not sufficiently clear to find that Congress intended in 253(a) to transfer to this Commission the states' power to regulate the activities of their municipalities. It found, in particular, that because Congress left "entity" undefined in the Communications Act, and because the City of Abilene did not offer other textual evidence to support preemption, the City could not establish that Congress clearly intended for municipalities to be considered "entities." Consistent with the scope of the Texas Preemption Order, the court stated that the issue of whether utilities owned by municipalities are "entities" within the meaning of Section 253(a) was not before it.

8. The Missouri Municipals argue that HB 620 squarely presents the issue of whether a state law that prohibits municipally-owned utilities from providing telecommunications service violates section 253 of the Act. They maintain that this case differs from the Texas Preemption Order and Abilene because, in those two cases, the Commission and the court declined to rule on whether the term "any entity" in section 253 applies to utilities owned by municipalities. They state that even if the court and the Commission were correct in concluding that Congress did not clearly intend to include municipalities that do not own and

operate electric utilities within the scope of section 253(a), Congress did clearly intend the term "any entity" to apply to power companies owned by municipalities. They argue that "any entity" should be interpreted broadly to include such municipally-owned utilities, and assert that the legislative history of section 253 confirms that these entities are included within the scope of section 253(a).

III. DISCUSSION

9. We do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state of Missouri, from providing telecommunications services or facilities. As we found in the Texas Preemption Order, the term "any entity" in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation. Because we find that HB 620 is not proscribed by section 253(a), we need not determine whether it falls within the reservation of state authority set forth in section 253(b). We do find however that if a municipally-owned utility has an independent corporate identity that is separate from the state and seeks to provide tele-communications services and facilities in this context, then it can be considered an entity for which section 253 preemption is available.

10. While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the Texas Preemption Order that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996

Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. We noted that the degree of advanced services deployment in Muscatine, which has three facilities-based, high-speed service providers for residential customers, including the municipal utility, is due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services. Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities. We are also encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives.

11. We continue to recognize, as the Commission did in the Texas Preemption Order, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be

dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

A. Application of HB 620 to Municipalities

12. HB 620 prohibits political subdivisions from becoming certified to provide telecommunications services or facilities. According to the Missouri Municipals, HB 620 therefore prohibits municipalities from providing such services themselves or from making their facilities available to others for use in competing with the incumbent providers. We are thus presented in this proceeding with the same issue that the Commission addressed in the Texas Preemption Order whether section 253 bars a state from deciding that it will not permit its subdivisions to compete in the provision of certain telecommunications services. This is a fundamental issue concerning the relationship between a state and its political subdivisions.

13. Consistent with the Texas Preemption Order and the court's holding in Abilene, we conclude that because municipalities, as political subdivisions of the state, are not "entities" within the meaning of section 253(a), HB 620 does not violate 253(a) to the extent that it prohibits them from becoming certified to provide telecommunications service or facilities. The Missouri Constitution authorizes cities with more that 5,000 inhabitants to adopt city charters allowing them to operate independently of the state, except that they may not undertake any activities which are inconsistent with the state constitution or limited by statute. HB 620 is a statute the Missouri legislature has adopted to limit the powers of its political subdivisions, including its municipalities. HB 620 is therefore like section 3.251(d) of PURA95 in Texas in that it prohibits Missouri's municipalities, as political subdivisions of the state, from

providing telecommunications service. As we found in the Texas Preemption Order, preempting the enforcement of HB 620 as it applies to municipalities would insert the Commission into the relationship between the state of Missouri and its political subdivisions in a manner that was not intended by section 253.

14. We are not persuaded by the Missouri Municipals' arguments that we are not bound by the findings in the Texas Preemption Order or the Abilene decision regarding the scope of section 253(a). The court found in Abilene that although the text of section 253(a) refers broadly to "any entity," such language is not clear enough to demonstrate, pursuant to Gregory, that Congress intended to intrude upon state-local government relationships. The Missouri Municipals, who filed their petition for preemption before the D.C. Circuit issued the January 1999 Abilene decision, argue in a supplemental filing that the Commission should not adhere to that decision, but should interpret the term "any" in section 253(a) in the same manner in which it interpreted that term in an unrelated proceeding issued after the Texas Preemption Order. Specifically, they point out that the Commission determined in the Pole Attachment Order that Congress' use of the term, "any telecommunications carrier" in section 224 of the Act, which regulates utility pole attachments, is an express indication that Congress intended both wireless and wireline carriers to be able to attach equipment to public utility poles. They argue, by analogy, that the Commission should similarly recognize that "any entity" in section 253(a) is a plain language indication that Congress intended to include all entities, both publicly-owned and privately-owned, within the scope of section 253(a). The Eleventh Circuit held recently in Gulf Power Company v. FCC that despite Congress' use of the term "any" in section 224, the Commission does not have authority to regulate pole attachments for wireless communications because utility poles are not bottleneck

facilities for wireless carriers. For purposes of this case, Gulf Power Company demonstrates that the term "any" cannot be interpreted in its broadest sense if the statute in question is not intended to apply to every type of entity. Accordingly, we cannot interpret the term "any" in section 253(a) to include municipalities because, as explained in the Texas Preemption Order and Abilene, the statute does not apply to these entities. Indeed, the court stated in Abilene that the Act provides no evidence that Congress' intended that the term "any entity" would include every conceivable thing within the category of "entity."

15. We also disagree with APPA that the Cowlitz River Dam cases support preemption of HB 620. APPA argues that those cases establish that when a state grants its political subdivisions authority to engage in activities that are subject to federal law, state laws that would be preempted if applied to privately-owned providers of service are also preempted as applied to the same activity by publicly-owned providers. In the primary case, the Ninth Circuit found that a potential municipal licensee that was authorized by the Federal Power Commission to construct and operate hydroelectric dams could not be subjected to state licensing regulations, but need only show compliance with federal regulations governing dam construction in order to obtain a license. The court therefore found that the Federal Power Commission acted within its authority in not requiring the City to comply with the relevant state laws. Unlike the case before us here, the state did not argue that the City of Tacoma lacked legal authority to engage in hydroelectric activities in the first instance. In fact, the court stated expressly that "[w]e do not touch on the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the [Federal Power] Commission as relevant to the practicability of the plan, but

the Commission has no power to adjudicate them." The court thus recognized, similar to our finding here, that questions involving the "legal capacity" of the municipality to undertake hydroelectric activities must be left to the state.

B. Application of HB 620 to Municipally-Owned Utilities

16. We conclude that we cannot adopt the Missouri Municipals' argument that, notwithstanding the Texas Preemption Order and Abilene, section 253(a) clearly applies to municipally-owned utilities that seek to provide competitive telecommunications service. Although the Commission expressly declined in the Texas Preemption Order to decide whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility, we adhere to the analysis in that case and in Abilene regarding state sovereignty when we address this issue.

17. As we stated above, the Commission clearly found in the Texas Preemption Order that section 253(a) does not apply to the political subdivisions of a state. The Missouri Municipals have not presented any evidence that municipally-owned utilities are not considered to be political subdivisions in Missouri. Although "political subdivision" is not defined in Missouri's public service commission law, of which HB 620 is part, the Supreme Court of Missouri has found a municipality and its municipally-owned utility to be political subdivisions under the Missouri Constitution's taxation provisions. Indeed, it appears to be the case in Missouri that a municipally-owned utility is part of the city, itself. For example, the Missouri Municipals describe the City of Springfield in which the city council appoints a board to manage the city utility. Although the board has authority to manage the day-to-day operations of the utility, it is clear from the board's charter that the utility is effectively a department of the city and is not an entity with a separate juridical personality. The city council must approve the

utility's budget as well as the rates it charges, and like "other departments or agencies of the city," the utility must purchase supplies and equipment "in such a manner as to take advantage of the combined purchasing power of the city as a whole." Southwestern Bell also points out that under Missouri law, municipal public utility boards are not separate entities from the municipality, but operate as part of the city government, like the mayor, zoning commissions or boards of adjustment. Accordingly, we find that municipally-owned utilities that operate as political subdivisions of the state under Missouri law, rather than as entities with a separate juridical personality, are not entities subject to section 253(a).

18. We reject the Missouri Municipals' argument that even if municipally-owned utilities are political subdivisions of the state, the legislative history of section 253(a) demonstrates that Congress clearly intended the term, "any entity" to cover municipal electric utilities. The Missouri Municipals cite scattered excerpts of legislative history to support their argument. They explain that the 103rd Congress heard testimony about the benefits of municipal utility entry, and then broadly defined "telecommunications service" in the precursor to the 1996 Act to include service provided by "all entities," which the Missouri Municipals infer to include municipally-owned utilities. They also state that in a report addressing the provisions of the Act that would later become section 253(a), Congress indicated that states or local governments that own and operate municipal energy utilities may make their telecommunications facilities available to certain telecommunications carriers, but not others, without violating the principle of non-discrimination. The Missouri Municipals also point out that the 104th Congress, which adopted the 1996 Act, noted that states may not rely on section 253(b) of the Act to prohibit a "utility" from providing telecommunications service. We are not persuaded that this legislative history is enough to overcome the court's holding

in Abilene that the "language of the federal law" must indicate that Congress intended to reach into the state governmental structure. Even if we were to look outside the language of the statute to discern Congress' intent, the legislative history does not help clarify whether or not it intended section 253(a) to govern state-local relationships regarding the provision of telecommunications service. Other than indicating that municipal energy utilities may make their facilities available to carriers, the legislative history that the petitioners cite does not distinguish between publicly-owned and privately-owned utilities. Its limited reference to the ability of municipal energy utilities to lease spare capacity on their facilities does not indicate clearly or at all whether Congress intended to preempt states from prohibiting such a practice. We therefore cannot rely on the legislative history to find that Congress intended to include municipally-owned utilities within the scope of section 253(a). We are aware, as the Missouri Municipals point out, that the Supreme Court stated in Gregory that Congress need not list explicitly each entity that would be covered by a federal statute. The Court did state, however, that "it must be plain" to anyone reading the Act that it covers the entity in question. It is not plain from either the language of the statute or the legislative history that Congress intended to include municipally-owned utilities under section 253(a).

19. The Missouri Municipals also ask us to consider the impact of Congress' explicit statement in section 224(a)(1) of the Act that the term "utility," for purposes of pole attachments, does not include entities owned by the state. They argue that Congress affirmatively preserved this state exemption when it amended the definition of "utility" in the 1996 Act, and that the fact that it did not similarly limit the term "entity" in section 253(a) proves that it intended municipalities and municipally-owned utilities to be included within its scope. While we acknowledge that it appears that Congress considered in 1996 whether section 224 of the Act

should apply to state-owned utilities, it is not plain, as it needs to be under Gregory, that Congress also considered the application of section 253(a) to state or municipally-owned utilities and then unmistakably determined that it would apply to them.

20. We note that if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, we could reach a different result under section 253(a). If the utility were not acting as a political subdivision of the state, then issues of state sovereignty would not prevent the Commission from exercising its authority under section 253 to preempt the enforcement of a statute that prohibited the ability of the utility to provide telecommunications service.

21. We agree with UTC's observation that municipal utilities may have an independent corporate existence and undertake non-governmental, proprietary functions, but under Missouri law, it is not clear that a utility can undertake even proprietary functions without authority from the state. In the Texas Preemption Order, the Commission recognized that a municipality may provide telecommunications service as a proprietary function, but stated that it did not interpret section 253 to preclude a state from exercising its authority to restrict the activities of its political subdivisions, regardless of whether such activities are governmental or proprietary in nature. It found that while the provision of telecommunications services by a municipality may be a proprietary function, the provisions of Texas law requiring that the actions of its cities be consistent with state law did not appear to distinguish between proprietary and governmental functions. Similarly, the provisions of Missouri's law requiring that the actions of its cities be consistent with state law does not appear to distinguish between proprietary and governmental functions. As we indicate above, the municipal entity would therefore have to have an identity that is fully separate from the state in

order for the Commission to consider whether or not section 253(a) would be applicable.

22. We also note that HB 620 restricts a political subdivision from providing a telecommunication service for which a certificate of service authority is required, except that it may provide telecommunication service or facilities for "internet-type services." A municipally-owned utility should therefore be able to provide these services in Missouri whether or not it is operating as a political subdivision of the state.

23. Because we do not find that HB 620 violates section 253(a), as it applies to municipalities and municipally-owned utilities, we do not need to reach the issue of whether it falls within the reservation of state authority in section 253(b).

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption filed by the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities on July 8, 1998, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD AND
COMMISSIONER GLORIA TRISTANI

Re: The Missouri Municipal League: The Missouri

Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities

Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri,

Memorandum Opinion and Order, CC Docket No. 98-122.

We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's City of Abilene decision and the U.S. Supreme Court's decision in Gregory v. Ashcroft that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities. Given this precedent, Section 253(a)'s prohibition on state or local laws that prohibit the ability of "any entity" to provide any interstate or intrastate telecommunications service is not sufficiently clear.

The record in this proceeding contains many letters from Members of Congress that state unequivocally that it was the intent of Congress when it enacted section 253 to enable any entity, regardless of the form of ownership or control, to enter the telecommunications market and that it intended to give the Commission authority to reject any state or local action that prohibits such entry. We urge Congress to take these views to heart and consider amending the language in section 253(a) to address clearly municipally-owned entities. This would allow the Commission to address

the barriers to municipal entry that already exist in several other states, and would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential. We also urge the states, as the Commission has said before, to use safeguards other than an outright ban on entry to address any unfair competitive advantage that they believe a municipally-owned utility may have. The right policy for consumers is to have as many providers of telecommunications from which to choose barring entry by municipally-owned utilities does not give consumers that choice.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: The Missouri Municipal League: The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities

Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri,

Memorandum Opinion and Order, CC Docket No. 98-122.

I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.

In the Telecommunications Act, Congress recognized

the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions.

Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

I urge states to adopt less restrictive measures, such as separation or nondiscrimination requirements, to protect utility ratepayers or address any perceived unfair competitive advantages. Allowing the competitive marketplace to work will facilitate the type of innovation and investment envisioned by Congress when it enacted the Telecommunications Act. I join with Chairman Kennard and Commissioner Tristani in urging Congress to clarify its intention in section 253 with respect to prohibitions on entry by municipal utilities.

Respectfully submitted,

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February 18, 2003

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Nos. 02-1238, 02-1386, 02-1405

In the

Supreme Court of the United States

JEREMIAH W. NIXON, FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, and SOUTHWESTERN BELL TELEPHONE, L.P.,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES, AMERICA PUBLIC POWER ASSOCIATION, CITY UTILITIES OF SPRINGFIELD, CITY OF SIKESTON BOARD OF MUNICIPAL UTILITIES, and CITY OF COLUMBIA WATER & LIGHT,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the court below correctly held that Congress intended the term "any entity" in Section 253(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253(a), be interpreted broadly so as to protect both public and private entities from state barriers to entry into the competitive marketplace of telecommunications services.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that the Missouri Municipal League, the Missouri Association of Municipal Utilities, and the America Public Power Association are not-for-profit trade associations that represent the interests of public entities. None has stock owned by a parent corporation. Respondents City Utilities of Springfield, City of Sikeston Board of Municipal Utilities and City of Columbia Water & Light are units of local government in Missouri.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Missouri Attorney General Jeremiah W. Nixon, on behalf of the State of Missouri; the Solicitor General of the United States, on behalf of the Federal Communications Commission; and Southwestern Bell Telephone, L.P., have filed separate petitions seeking review of *Missouri Municipal League v. Federal Communications Comm'n.*, 299 F.3d 949 (2002). In that decision, the United States Court of Appeals for the Eighth Circuit held that the term "any entity" in Section 253(a) of the Telecommunications Act protects both private and public entities from state barriers to entry.

The three petitions make essentially the same arguments: (1) that the Eighth Circuit's judgment in *Missouri Municipal League* is in "direct conflict" with the earlier judgment of the United States Court of Appeals for the District of Columbia Circuit in *City of Abilene, Texas v. Federal Communications Comm'n.*, 164 F.3d 49 (D.C. Cir. 1999); (2) that the issue in these cases is one of substantial national significance; and (3) that the Eighth Circuit's judgment was incorrect on the merits.

Respondents, the Missouri Municipal League, *et al.*, agree that the Eighth Circuit and the D.C. Circuit reached different conclusions on whether "any entity" encompasses public entities. Respondents also agree that this is an important issue. Respondents do not agree, however, that *Missouri Municipal League* was incorrectly decided or that immediate Supreme Court review is necessary.

As discussed below, it is questionable whether any court, including the D.C. Circuit, will follow *Abilene* in the future. That is so because every court that has

subsequently conducted an independent analysis of the relevant issues has found that the *Abilene* court's analysis was incorrect and irreconcilable with decades of controlling Supreme Court precedents, particularly the Court's unanimous decision in *Salinas v. United States*, 522 U.S. 52 (1997).

Furthermore, contrary to the Petitioners' suggestion, this case does not pose serious issues of federalism. It is settled that, in matters affecting interstate commerce, Congress has authority under the Commerce Clause to preempt "traditional" or "historical" state powers. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1984). Thus, the issue here is purely one of statutory construction – whether Congress in fact exercised that authority in Section 253(a). *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

For these and the other reasons discussed below, the seeming conflict in this case is considerably less important than the Petitioners maintain, and it is clearly not one that "can be effectively resolved only by the prompt action of the Supreme Court alone."[1] Thus, respondents urge the Court to deny the petitions and leave it to the lower courts to lay *Abilene* to rest.

STATEMENT

A century ago, when electric power emerged in the United States, the private sector focused first on

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[1] R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice at 227 (8th ed. 2002), quoting Justice Harlan, Some Aspects of the Judicial Process of the United States Supreme Court, 33 AUSTL. L.J. 108 (1959).

electrifying the most densely populated and lucrative population centers and left much of America literally in the dark, particularly rural areas. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* at 30-31 (1986); D. Nye, *Electrifying America* at 26-27 (1990). Recognizing that electrification was critical to their economic development and survival, thousands of communities that were not large enough or profitable enough to attract private power companies created their own electric utilities. Public power utilities also emerged in several large cities, in which residents believed that competition was necessary to lower prices, raise the quality of service, or both. *Power Struggle*, at 32-38. Approximately 2,000 public power utilities continue to exist and thrive today.

In the mid-1990s, Congress overhauled the Nation's telecommunications laws, in part to stimulate deployment of advanced telecommunications services and capabilities to all Americans as rapidly as possible. While expressing a preference for private-sector leadership in this effort, Congress was well aware that the private sector could not meet this challenge alone and that public entities had a critical role to play in achieving the Nation's telecommunications goals. Senator Trent Lott (R-MS), a Senate manager of the Act, succinctly summarized Congress's understanding and intent as follows: "I think the rural electric associations, *the municipalities*, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[2]

---

[2] *Hearings on S. 1822, The Communications Act of 1994*, Before the Senate Committee on Commerce, Science and

Congress did indeed develop the right language, including Section 253(a) of the Telecommunications Act: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service" (emphasis added). As Respondents showed in their briefs to the Eighth Circuit, the congressional intent reflected in Senator Lott's statement can be traced directly into the "any entity" language of Section 253(a).

REASONS FOR DENYING THE PETITIONS

I. IMMEDIATE SUPREME COURT REVIEW IS UNNECESSARY

Respondents acknowledge that the D.C. Circuit in *Abilene* and the Eighth Circuit in *Missouri Municipal League* reached opposite conclusions about whether the term "any entity" in Section 253(a) of the Telecommunications Act covers public entities. It is also true that a number of lower courts, including two state supreme courts in the Eighth Circuit, have divided over this question. It does not follow, however, that immediate Supreme Court review is necessary. To the contrary, a closer examination of the timing and content of these cases indicates that the apparent conflict is well on its way to resolving itself without Supreme Court review. In fact, it is questionable whether any court, including the D.C. Circuit itself, will follow *Abilene* in the future.

Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at *378-79 (emphasis added).

The FCC first addressed whether the term "any entity" covers public entities in response to a preemption petition filed by the City of Abilene, Texas. The City alleged that Southwestern Bell had refused to upgrade its telecommunications infrastructure and services to support the City's economic development plans, that the City wanted to build its own telecommunications network to provide or facilitate competition for Southwestern Bell, and that a Texas law that barred municipalities and municipal electric utilities from providing telecommunications services to the public directly or indirectly effectively prohibited the City from doing so.

On October 1, 1997, the FCC denied Abilene's petition. *Public Utility Commission of Texas*, 13 FCC Rcd. 3460, 1997 WL 603179 (1997) (*Texas Preemption Order*). Finding that the Texas statute was an exercise of "fundamental" or "traditional" state powers, the FCC stated that its decision was governed by *Gregory v. Ashcroft*, 501 U.S. 457 (1991), which precludes the federal government from preempting state action in the absence of a "plain statement" in the statute or legislative history that Congress intended that result. *Id.* at ¶ 188. In the FCC's view, the term "any entity" in Section 253(a) did not go far enough to meet the *Gregory* standard. *Id.* at ¶ 173.

While denying preemption, the FCC observed that the Texas statute was unwise and unnecessary, and it urged other states not to do what Texas had done. *Id.* at ¶ 190. The FCC also expressly limited its decision to municipalities, such as Abilene, that do not operate their own municipal electric utilities. "[W]e do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications

services by a municipally-owned electric utility." *Id.* at ¶ 179.

Abilene appealed the FCC's decision to the D.C. Circuit. Among other points, Abilene's brief included a lengthy discussion of the legislative history of Section 253(a). In its opposing brief, the FCC conceded that the legislative history contains numerous references to municipal electric utilities, but it insisted that these references were irrelevant because the *Texas Preemption Order* did not address the rights of municipal electric utilities.[3] At oral argument, the FCC assured the court that the agency would deal with that issue fully and fairly in a proceeding involving a Missouri statute then pending before the agency.

While the *Abilene* appeal was pending, this Court decided the *Salinas* case. In *Salinas*, a state official claimed that *Gregory* required a narrow reading of the phrase "any business or transaction" in the federal bribery statute, as a broad interpretation would unduly disturb the federal-state balance. The Court rejected this argument:

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B).... The prohibition is not confined to a business or transaction which affects federal funds. *The word "any," which prefaces the*

[3] The relevant pages of the FCC's brief to the D.C. Circuit can be found online at the FCC's website, at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2142190001.

> *business or transaction clause, undercuts the attempt to impose this narrowing construction.*

Id. at 57, citing *United States v. James*, 478 U.S. 597, 604-605, and n. 5 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947) (emphasis added).[4]

The Court then went on to make clear that this decades-old rule of construction of the term "any" applies with full force in cases governed by *Gregory*'s "plain statement" standard:

> As we held in [*United States v.*] *Albertini*, [472 U.S. 675,] at 680, 105 S.Ct., at 2902 [(1985)].
>
> "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, "[w]e cannot press

[4] The Court's willingness to read "any" expansively in *Salinas* is all the more noteworthy because criminal statutes are ordinarily interpreted narrowly.

statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. *See Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue.

> *The plain-statement requirement articulated in Gregory and McNally does not warrant a departure from the statute's terms. The text of § 666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction.*

Salinas, 522 U.S. at 59-60 (emphasis added) (citations omitted).

Having found the text of the statute "unambiguous," the Court turned to the legislative history, not for confirmation that Congress intended that "any" be interpreted expansively, but for compelling evidence that Congress did *not* intend an expansive construction: "'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the language in issue].'" *Id.* at 57-58, quoting *Albertini*, 472 U.S. at 680.

Although the *Abilene* petitioners relied heavily upon *Salinas* in their reply brief and oral argument, the D.C. Circuit did not follow or even mention *Salinas* in its opinion. Instead, it affirmed the *Texas Preemption Order* on the grounds that *Gregory* required more than a mere linguistic possibility that "any entity" covered public entities, that the court could not discern the "tone of voice" that Congress had used when it wrote those words, and that Abilene had presented "nothing else" to confirm that Congress intended the term "any entity" to apply to public entities. *Abilene*, 164 F.3d at 52.

The D.C. Circuit did not attempt to reconcile its interpretation with the pro-competitive purposes of the Telecommunications Act, nor did it even discuss the statutory objectives. The court brushed aside the legislative history in a footnote at the end of its decision – "Abilene fails to acknowledge that the statements it quotes deal with an issue not before us – whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 149 F.3d at 53 n.8.

Within months of the D.C. Circuit's decision in *Abilene*, two state courts embraced it – *Iowa Telephone Ass'n. v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), and *Municipal Electric Authority of Georgia v. Georgia Public Service Commission*, 525 S.E.2d 399 (Ga. App. 1999). Neither court performed an independent analysis of the underlying issues; both courts simply deferred to the FCC as the federal agency responsible for administering the federal telecommunications laws.[5]

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[5] The Iowa court had little incentive to perform an independent analysis, as it found a different ground on which to overturn the State's ban on municipal telecommunications services.

On January 12, 2001, the FCC issued its decision in the Missouri case. Finding that municipal electric utilities were indistinguishable from municipalities under Missouri law, the FCC concluded that *Abilene* had disposed of the rights of municipal electric utilities after all. The five FCC commissioners unanimously deplored this result, but they concluded that *Abilene* tied their hands:

> While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. We noted that the degree of advanced services deployment in

> Muscatine, which has three facilities-based, high-speed service providers for residential customers, including the municipal utility, is due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services. Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities. We are also encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives.

In re Missouri Municipal League, et al., 16 FCC Rcd 1157, 2001 WL 28068 ¶ 10 (rel. January 12, 2001) (*Missouri Preemption Order*). Three of the five commissioners also wrote separate statements underscoring their dissatisfaction with the anti-competitive effects of the decision. *Id.*

On May 16, 2001, the tide turned. In *City of Bristol v. Earley*, 145 F.Supp.2d 741 (W.D. Va. 2001) (vacated as moot upon enactment of corrective legislation), the federal district court carefully examined the underlying statutory issues and found that "any entity" does indeed cover public entities.[6] In the key passage of its decision, the court stated:

> The Supreme Court has held that the use of the modifier "any" in a federal statute precludes a narrow interpretation of the law's application. *See Salinas v. United States*, 522 U.S. 52, 57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see also United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."). Specifically, the Court has held that where Congress uses unambiguous statutory language, such as the word "any," it has expressed a "clear and manifest" intent to preempt a traditional area of state law, satisfying *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395. *See Salinas*, 522 U.S. at 60, 118 S.Ct. 469. ("The plain-statement requirement articulated in

[6] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), holds that a court should defer to an agency's interpretation of a statute only if the court first independently determines that Congress has not spoken to the precise matter in issue and that the statute is ambiguous or silent on that issue. That determination is one that the court must make for itself, applying the traditional tools of statutory construction, and unaided by the agency's interpretations. These tools include the language, structure, purposes and legislative history of the statute. *Id.* at 842-43

> *Gregory* ... does not warrant a departure from the statute's terms.").

Bristol, 145 F.Supp.2d at 747. The district court also carefully examined, and ultimately rejected, the D.C. Circuit's analysis in *Abilene*. In particular, the *Bristol* court took issue with the D.C. Circuit's point that it could not hear Congress's "tone of voice," as the fact "[t]hat judges are unable to hear certain tonal emphases of a legislature has never been an obstacle to statutory interpretation." *Id.* at 749. The court also stated that, "[w]here the plain and ordinary meaning of a statute gives a 'straightforward statutory command, there is no reason to resort to legislative history.' Nevertheless, the legislative history here supports a broad, rather than narrow, interpretation." *Bristol*, 145 F.Supp.2d at 748 (citation and footnote omitted).

Next, in *Missouri Municipal League*, the Eighth Circuit followed *Bristol's* lead and carefully examined the relationship between *Gregory* and the Supreme Court's precedents on interpreting the modifier "any," particularly *Salinas*. *Missouri Municipal League*, 299 F.3d at 952-55. While affording "all due deference to our sister circuit's holding, and mindful of our desire to maintain uniformity among the circuits," *id.*, the Eighth Circuit found that *Abilene* was simply not persuasive:

> Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no

> reference in any of the Supreme Court's decisions regarding the word "any" about Congress's "tone of voice" and "emphasis."

Id. at 955.

After the Eighth Circuit panel rendered its decision, the FCC and Southwestern Bell sought reconsideration or reconsideration *en banc*, asserting that the panel had failed to address two post-argument Supreme Court cases –*Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002) and *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 122 S.Ct. 2226 (2002). At the court's request, the Missouri Municipal League responded, showing that *Raygor* and *Columbus* were consistent with the panel's ruling. The court denied reconsideration.

Most recently, the Supreme Court of Nebraska held in *In Re: Application of Lincoln Electric System*, 655 N.W.2d 363 (Neb. 2002), that the term "any entity" encompasses public entities and that the D.C. Circuit's analysis in *Abilene* was incorrect. *Lincoln Electric* may be particularly useful in predicting what courts will do in the future because the Nebraska Supreme Court was not bound by either *Abilene* or *Missouri Municipal League* and elected to follow the latter simply because it was the better reasoned decision. "[W]e are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas*, and other cases, Congress' use of the phrase 'any entity' in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services." *Id.* at 371-72 (citation omitted).

Two additional considerations suggest that even the D.C. Circuit might decline to follow *Abilene* in the future. First, as indicated, the *Abilene* court did not attempt to reconcile its interpretation of "any entity" with the pro-competitive purposes of the Telecommunications Act. It is possible that the court failed to do so because this Court had not yet issued its key ruling on the proper allocation of authority under the Telecommunications Act between the federal government and the States. That occurred twenty days after *Abilene* was decided, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). In that case, this Court reversed two decisions in which the Eighth Circuit had held that the FCC's Interconnection Order unduly intruded upon State authority over local telecommunications matters. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), and *State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997).[7]

On behalf of the majority, Justice Scalia forcefully dispelled any doubt about the primacy of federal law under the Act:

> The question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

Iowa Utilities Board, 525 U.S. at 378 n.6. Elsewhere, Justice Scalia noted:

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[7] In one of these cases, the Eighth Circuit had found that the FCC crossed over a fence that was "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." *Iowa Utilities Board*, 120 F.3d at 800.

> The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way.

Id. at 396.

Notably, two of the judges on the panels of the Eighth Circuit cases that this Court reversed in *Iowa Utilities Board* (Judges Wollman and Bowman) were also on the panel that decided *Missouri Municipal League*. Thus, the *Missouri Municipal League* panel unquestionably approached the "any entity" issue, not just with a high degree of respect for state sovereignty, but also with an acute awareness of the strength of this Court's views about federal supremacy vis-à-vis the States in achieving the pro-competitive purposes of the Telecommunications Act. With this Court's *Iowa Utilities Board* decision in hand in a future case, the D.C. Circuit's approach to the "any entity" issue might well mirror that of the Eighth Circuit.[8]

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[8] In *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997), the D.C. Circuit declined to defer to an unduly restrictive interpretation of the term "entity" in 47 U.S.C. § 275, finding that the FCC's decision reflected "no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." On remand, the FCC found that "entity" should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Telecommunications Act; that such an interpretation is "consistent with the idea that 'entity' is 'the broadest of all definitions which relate to bodies or units,'" that such a broad interpretation is "reflected in judicial and statutory definitions of 'entity' in other contexts;" and that "entity" includes "a division of a government bureau...." *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).

Second, as also indicated above, the D.C. Circuit decided *Abilene* on the understanding, which the FCC had fostered, that the court's decision would not adversely affect the rights of municipal electric utilities. "Abilene fails to acknowledge that the statements it quotes [from the legislative history] deal with an issue not before us – whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 149 F.3d at 53 n.8. Had the D.C. Circuit anticipated that the FCC would subsequently insist that *Abilene* had indeed disposed of the rights of municipal electric utilities, despite the court's explicit statement that it was *not* doing so, the D.C. Circuit might well have viewed *Abilene* in a wholly different light. In the future, it would undoubtedly do so.

In summary, the D.C. Circuit arrived at the wrong conclusion in *Abilene* because it asked the wrong question. Under *Gregory*, as clarified by *Salinas*, Congress's unqualified, expansive use of "any entity" in Section 253(a) was a "plain statement" on the face of the Telecommunications Act that Congress intended to protect all entities, including public entities, from state barriers to entry. The force of that statement could be undermined only if other language in the Act or the legislative history compelled a narrowing construction. Thus, the D.C. Circuit should have asked, "Is there any such narrowing language in the statute or legislative history?" The answer to that question would clearly have been "No," as the language, structure, purposes and legislative history all support the conclusion that Congress intended that the term "any entity" cover

public entities. Instead, the D.C. Circuit looked for a *second* plain statement that would *confirm* that Congress really meant what it said when it used the term "any entity" without restriction. As the *Bristol*, *Municipal League*, and *Lincoln Electric* courts concluded, and as other courts are likely to conclude in the future, the *Abilene* court's approach was incompatible with *Salinas* and other Supreme Court precedents and simply wrong.[9]

To be sure, it is possible that the D.C. Circuit or some other circuit court may follow *Abilene* in the future. If that occurs, a conflict requiring Supreme Court review will indeed be present. For now, however, one can only speculate that this will occur. In these circumstances, the Court should deny the petitions.

II. THE PETITIONERS HAVE FAILED TO SHOW THAT *MISSOURI MUNICIPAL LEAGUE* WAS INCORRECTLY DECIDED

As shown in the previous section, this case is governed by *Salinas* and the nearly six decades of similar Supreme Court precedents on which the Eighth Circuit relied in *Missouri Municipal League*. The Petitioners have offered no persuasive arguments to support a contrary conclusion.

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[9] In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), this Court held that the term "any other final action" must be interpreted broadly, observing that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.*, 446 U.S. at 592. That is what the D.C. Circuit did here.

First, the Petitioners do not, and cannot, dispute the fact that this Court *unanimously* and *explicitly* held in *Salinas* that the Court's long-standing rule of construction of "any" applies in cases governed by *Gregory*'s plain-statement standard. The State of Missouri does not mention *Salinas* at all in its petition. The FCC quotes *Salinas* but offers no comment on it. FCC Petition at 6-7. Southwestern Bell does discuss *Salinas*, but it ignores this point. Southwestern Bell's Petition at 16.

Second, *Salinas* itself refutes the suggestion at page 16 of Southwestern Bell's petition that the Court decided the *Salinas* case as it did only because it believed that a broad interpretation of the federal bribery law would not intrude upon state sovereignty. To the contrary, the *Salinas* Court made clear that courts should not disingenuously evade giving effect to a clear expression of congressional intent just to avoid disturbing the federal-state balance. *Salinas*, 522 U.S. at 59. Furthermore, the Eighth Circuit did not hold, as Southwestern Bell maintains, that *Salinas* requires that "any" be interpreted expansively in all cases. Southwestern Bell Petition at 16. The Eighth Circuit was well aware that *Salinas* held only that "any" must be interpreted broadly only if no other language in the statute or legislative history requires a narrowing construction. The Eighth Circuit did not interpret the term "any entity" in a vacuum, as the D.C. Circuit did in *Abilene*, but with due regard for the pro-competitive purposes of the Telecommunications Act. *Missouri Municipal League*, 299 F.3d at 951-52. Indeed, the Eighth Circuit quoted the FCC's own findings to that effect. *Id.* at 952.[10]

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[10] Notably, none of the Petitioners pressed the arguments on which the FCC actually relied in rebuffing *Salinas* in its *Missouri Preemption Order*, at ¶ 14 n.49. The FCC's first argument – that

Third, as the Respondents demonstrated to the Eighth Circuit, this Court's recent *Raygor* and *City of Columbus* decisions are not inconsistent with the conclusion that "any entity" includes public entities. In *Raygor*, the Court declined to read "any claim" in the federal tolling statute broadly enough to cover state-law claims against non-consenting states that had been dismissed on Eleventh Amendment grounds. Believing that "the particular context" of the provision at issue made Congress's intent unclear, the Court invoked the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Raygor*, 534 U.S. at 545-46, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). In contrast to the murky statutory context in *Raygor*, the Telecommunications Act's language, structure, purposes and legislative history all compel the conclusion that "any entity" includes public entities.

Similarly, in *City of Columbus* the Court merely reiterated its long-standing view that municipalities are not sovereign entities that are independent of the states from which they derive their authority. *City of*

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other language in the federal bribery statute supported a broad reading of "any business or transaction" – missed the *Salinas* Court's point that a court must interpret "any" expansively unless other language in the statute or legislative history is *inconsistent* with that construction. The FCC's second argument – that, unlike the federal bribery statute, "section 253(a) is susceptible of more than one interpretation, as the D.C. Circuit already determined in *Abilene*" – was insistent the *Salinas* Court's statements that Congress's unrestricted, expansive use of "any" creates no ambiguity and that "a statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60.

Columbus, 122 S.Ct. at 2228. That point, however, as the Eighth Circuit correctly held, is not germane to whether a unit of local government is an "entity" as that term is used in Section 253(a). *Missouri Municipal League*, 299 F.3d at 953. Furthermore, as the Court made clear in *Sailors v. Board of Educ.*, 387 U.S. 105, 109 (1967), the "vast leeway" that states have in managing their political subdivisions ends at the point that state management "runs afoul of a federally protected right." Here, the Supremacy Clause and Section 253(a) furnish local governments such a federally protected right.

Fourth, the FCC suggests in its petition that *Abilene*'s construction of Section 253(a) is the "better view" because "[t]he term "entity" "bears different meanings depending upon the context." FCC Petition at 13, quoting *Southern Co. Servs., Inc.* v. *FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002). The FCC misses the point that "entity" does not stand alone in Section 253(a) but is preceded by the unqualified and expansive modifier "any." Accordingly, the rule of statutory construction articulated in *Salinas* – which the FCC does not challenge here – comes into play.

Finally, the State of Missouri, Southwestern Bell and certain *amici curiae* contend that the Eighth Circuit erred for various policy reasons. The short answer to this is the one that the Eighth Circuit gave: "*Gregory* does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. ... [W]e ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law." *Missouri Municipal League*, 299 F.3d at 953. In any event, if policy questions are relevant

here, the FCC definitively answered them when it found in its Texas and Missouri preemption orders that municipal entry can significantly advance the pro-competitive objectives that Congress sought to achieve in enacting the Telecommunications Act.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petitions for writs of certiorari.

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IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents,

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents,

SOUTHWESTERN BELL TELEPHONE, L.P., *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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NEBRASKA CABLE COMMUNICATIONS ASSOCIATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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NEBRASKA CABLE COMMUNICATIONS ASSOCIATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Nebraska Cable Communications Association ("NCCA") respectfully submits this brief *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

NCCA is a non-profit corporation formed in 1971 for the purpose of promoting the development of the cable-television industry in Nebraska. NCCA currently has 13 member companies from across the State. These companies, which include both large urban cable operators and small rural operators, provide multichannel video programming service, high-speed Internet access, and various other services. NCCA participated in the litigation that resulted in a decision in which the Supreme Court of Nebraska, relying on the Eighth Circuit's decision that petitioners challenge here, held that Section 253 of the Communications Act, 47 U.S.C. § 253, pre-empts state statutes that prohibit municipalities from providing telecommunications services. *See In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 368-72 (Neb. 2003). NCCA participated in that litigation because its members, while generally welcoming competition, oppose unfair competition from the municipalities that regulate them.

ARGUMENT

The purpose of this brief is not to repeat the legal arguments made in the three well-crafted petitions that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. We have filed their consent letters with the Clerk of this Court.

have been filed (including one petition filed by a State and one by the Federal Government). Rather, the purpose of this brief is to underscore and illustrate the practical significance of the issues at stake from the perspective of firms that have experienced it first-hand.

So-called "municipal overbuilds" (communications networks built and operated by municipalities or municipally-owned utilities) are a familiar and growing phenomenon in the cable-television industry. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901, ¶ 13 (2002) ("Reports indicate that 450 public power systems offer communications services, up from 357 offering service last year."). The growth in the number of municipal systems appears to have accelerated during the past five years, as technological advancements have allowed overbuild networks to increase revenue by offering high-speed Internet service and telephony along with traditional cable-television service. *See, e.g.*, Dinesh Kumar, *Large Number of Municipal Utilities Eye the Broadband Market*, Comm. Daily, Apr. 1, 2003, at 3-4; Paula L. Stepankowsky, *Portland Phone Foray Could Spread*, Wall St. J., Mar. 12, 2003, at B9F; *Municipalities Seek Greater Role in Rural Broadband Rollout*, Comm. Daily, Jan. 16, 2002, at 5-6; David Armstrong & Dennis K. Berman, *Fighting City Hall: Telecom Companies Confront New Rival: the Municipal Network*, Wall St. J., Aug. 17, 2001, at A1.

It may well be that some of these networks are built out of a sincere desire to hasten the proliferation of broadband service in rural areas or to reap economies of scope between communications networks and already-existing electrical grids. *See, e.g.*, Michael Lafferty, *Small Towns Building Broadband Futures*, Communications Engineering and Design, Jan. 2001 <http://www.cedmagazine.com/

ced/2001/0101/id3.htm>; Matt Stump, *Kutztown, Pa., Muni Has Lots of Fiber*, Broadbandweek, Mar. 25, 2002 <http://www.opticalsolutions.com/articles/broadbandweek 032302.shtml>. But, even where that is true (and it is far from clear that it invariably is), there are severe drawbacks to public participation in potentially competitive markets.

Government entry into an industry that is in part privately owned inevitably gives rise to concerns about unfair competition. *See, e.g.*, Stephen G. Breyer, *Regulation and Its Reform* 183 (1982). In particular, government participation in private markets gives rise to concern about the two categories of anticompetitive misbehavior that have traditionally been of concern to utility regulators: "access discrimination" and "cross-subsidization." *See generally* William Baxter, *Antitrust Policy, reprinted in American Economic Policy in the 1980s* 601-04 (M. Feldstein ed. 1994). The former refers to a monopolist's refusal to allow non-discriminatory access to inputs necessary to production in an adjacent market. The latter refers to a monopolist's ability to subsidize its entry into a competitive adjacent market, allowing it consistently to undercut its rivals' rates.

As for access discrimination, local governments control access to public rights-of-way, a necessary input for any communications network. Based in part on their control of those rights-of-way, local governments have been allowed to exercise extensive regulatory oversight with respect to the cable industry. *See generally* 47 U.S.C. § 541, *et seq.* In particular, they hold authority to grant the licenses that cable operators need to provide service (so-called "franchises"), *see id.* § 541, may impose franchise fees, *see id.* § 542, may terminate franchises, *see id.* § 546, may block system sales, *id.* § 547, and may enforce consumer protection rules, *see id.* § 552.

Thus, as the FCC has acknowledged, "entry by municipalities into telecommunications may raise . . . questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor." *Public Utility Comm'n of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 190 (1997); Pet. App. in No. 02-1386 at 25a. That fear is well-grounded. *See generally* Pet. in No. 02-1405, at 4-5 (recounting municipalities' conduct in Missouri). In particular, municipalities have routinely taxed private cable operators while not imposing a commensurate burden on their own affiliates. *See, e.g.*, Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 Nw. U. L. Rev. 1099, 1117-18 (2001); Joe Estrella, *Ohio Bill Sets Overbuild Ground Rules*, Multichannel News, June 5, 2000 <http://www.multichannel.com/index.asp?layout=story_stocks&articleid=CA18638>.

Indeed, many municipal networks have their very origin in network facilities obtained from private firms as in-kind "taxation." Although federal law permits municipalities to charge cable operators and telecommunications carriers for use of public rights-of-way, federal law also sets certain limits. *See* 47 U.S.C. §§ 253(c), 542(b). Perhaps in part to evade these limits, municipalities have sometimes demanded that applicants provide various in-kind benefits, including network facilities. *See, e.g.*, Pet. in No. 02-1405, at 4 (recounting how municipalities often demand that, as a condition to use of public rights-of-way, firms contribute conduit or optical fiber); Paula L. Stepankowsky, *Portland Phone Foray Could Spread*, Wall St. J., Mar. 12, 2003, at B9F ("Portland got into the phone business [because it] owned a patchwork of physical assets

it had acquired through the cable-franchising process, such as conduit and unused fiber-optic lines.").

In addition to concerns about access discrimination, there are obvious concerns about cross-subsidization. "Most of the public fiber-optic systems are built by municipally owned electric utilities." *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1. Because many assets (including utility poles) are used simultaneously for both electric and telecommunications purposes, it is not difficult to misallocate costs to the electric side, thus in effect making captive ratepayers finance the network's ability to undercut telecom rivals' rates. *See Municipal Entry into the Broadband Cable Market*, 95 Nw. U. L. Rev. at 1113-16. At a minimum, municipalities possess the ability to issue tax-free bonds, thereby reducing their costs in a way that no private competitor can match. *See id.* at 1116-17.

In many other cases, however, cross-subsidization takes on a much less subtle form. Municipal networks generally operate at a loss. *See, e.g., Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 (quoting University of Denver finance professor Ronald Rizzuto as saying: "'By and large, they all lose money.'"). Often, they receive an express subsidy either from the affiliated electric utility or simply from the public fisc. *See, e.g.*, Mitch Shapiro and Don Gall, *The New Economics of Overbuilds*, Broadband Markets <http://www.broadbandmarkets.com/articles/NewEconomics2.htm> ("municipal overbuilds . . . often enjoyed some level of subsidy from a local government or municipal utility"); *Municipalities Seek Greater Role in Rural Broadband Rollout*, Comm. Daily, Jan. 16, 2002, at 5-6 (quoting cable executive as saying: "'We were able to show that they [municipalities] were subsidizing cable with revenues from vital operations like electricity and water.' If municipalities are providing cheaper telecom service, they're doing it by raising fees for services such as water

and electricity, he said."); *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 (municipal networks are "[f]unded in many cases by special municipal bonds and in others by cash generated by local utilities"); *id.* ("Tacoma Power funded Click! Network from a $100 million surplus generated from power sales to California and other states.").

Quite apart from concerns about anticompetitive conduct, the inefficiencies inherent in public ownership have been well chronicled. *See*, *e.g.*, N. Gregory Mankiw, *Principles of Microeconomics* 333 (2d ed. 2001) ("Put simply, as a way of ensuring that firms are well run, the voting booth is less reliable than the profit motive."); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 657 (3d ed. 2000) ("Often, government-owned firms are less efficient than privately owned firms. Managers have less of an incentive to maximize profits under public ownership.") (citations omitted); II Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 328 (1998) (noting "[t]he virtual disappearance" of government ownership as a policy prescription for industrial organization). Likely inefficiency is of legitimate concern to policymakers at the state level: ultimately, local tax- and ratepayers must shoulder the burden in the form of higher taxes or electricity rates.

Problems resulting from municipal ownership of communications firms are thus serious and widespread. It is precisely for that reason that States across the Nation have enacted statutes like the Missouri statute under review.[2]

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[2] *See* Pet. in No. 02-1238, at 12 n.4; Pet. in No. 02-1386, at 15 n.6; Pet. in No. 02-1405, at 10 n.10. Some of the States involved do permit municipalities to offer certain telecommunications-related services in which they do not compete directly with private firms. *See*, *e.g.*, Neb. Rev. Stat. Ann. § 86-575(1) (Michie Supp. 2002) (permitting municipalities to provide so-called "dark fiber").

The remedy chosen in such statutes — a ban on entry into potentially competitive markets (or "quarantine") — is hardly an unusual policy prescription to address problems of access discrimination and cross-subsidization. To the contrary, that remedy has been extensively employed by the Federal Government itself. *See*, *e.g.*, 47 U.S.C. § 271(a) (prohibiting Bell Companies from providing long-distance service); *id.* § 533(b) (repealed 1996) (prohibiting telephone companies from providing cable television service); 15 U.S.C. § 79i(a)(1) (prohibiting any utility holding company from owning interest in any other business); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (approving "Modified Final Judgment" prohibiting Bell Companies from providing long-distance service).

It is simply unlikely that the United States Congress intended to deprive the States of the option to employ a similar policy solution. That is particularly so when States routinely place a wide range of limitations on local government power.[3] It is implausible that Congress meant to single out one particular such limitation for pre-emptive treatment, yet did so without expressly mentioning it.

The decision of the Eighth Circuit is therefore mistaken. That decision not only interferes with sovereign States' ability to shape their internal distribution of governmental powers, but also threatens significant economic injury to their citizens. This Court should therefore grant review and reverse the Eighth Circuit's judgment.

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[3] Indeed, many States follow "Dillon's Rule," under which municipalities "have only those powers expressly granted by state law or necessarily implied from express powers." *Marcus Cable v. City of Bristol*, 237 F. Supp.2d 675, 678 (W.D. Va. 2002); *see also Municipal Elec. Auth. of Georgia v. Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399 (Ga. Ct. App. 1999).

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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Nos. 02-1238, 02-1386 and 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON,
Attorney General of Missouri, *et al.*,
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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preserves or preempts the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

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IN THE

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Respondents.

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.2(a) of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint has substantial local, long distance, and wireless telephony operations throughout the United States. Several

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[1] Sprint's brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

Sprint subsidiaries are incumbent local exchange carriers serving approximately eight million local access lines in predominantly rural communities of eighteen states, including more than 250,000 local access lines in Missouri. Other Sprint subsidiaries offer nationwide wireless and long distance services, and provide competitive local exchange service in more than thirty states.

Sprint's customer, employee, and shareholder constituencies are vitally interested in this case. The D.C. Circuit and the Eighth Circuit have split over the proper construction of Section 253(a) of the Telecommunications Act of 1996 (the "1996 Act"), issuing diametrically opposed rulings on the power of States to prohibit their political subdivisions from entering local telecommunications markets. Other federal and state courts have issued similarly conflicting rulings. This split of authority undermines rational implementation of the 1996 Act and is creating confusion in state capitals across the country. Without effective state control, market entry by political subdivisions into this complex, volatile industry creates significant risks to taxpayers, who are forced to subsidize the ventures, harms the employees and shareholders of private sector companies that have invested in these local communities, and undermines fair and effective competition. The Eighth Circuit's expansive reading of the preemptive scope of Section 253(a) seriously threatens Sprint's investments and interests in Missouri and other states.

SUMMARY OF ARGUMENT

The question presented by the petitions implicates important competition and public policy issues that transcend the interests of the parties and directly affect consumers and private industry nationwide. Municipalities and other state political subdivisions historically are less efficient than private sector companies in providing competitive telecommunications services, yet they enjoy numerous financial,

regulatory, and other advantages that are difficult if not impossible to quantify or regulate. For example, a municipality can subsidize its operations with taxes and other public revenues, can issue tax-free debt, has superior access to public rights-of-way, and is not subject to the same profit expectations or accounting standards as a private company. Entry into competitive local telecommunications markets by government providers, therefore, involves a host of complex questions, including the extent to which taxpayers (including private competitors) may be forced to subsidize a government entrant's provision of such services, the types of signals and incentives that will be given to private industry regarding market entry and investments in infrastructure and new technologies, and the long-term interests of consumers.

Many states have chosen to prohibit their political subdivisions from providing local telephone service and have focused instead on more traditional and tailored governmental actions to promote competition, such as tax incentives and regulatory reform. States that have permitted their political subdivisions into the market, on the other hand, have become embroiled in extensive efforts to implement and enforce "level playing field" laws, which attempt to limit the ability of government entrants to use tax subsidies and other advantages to obstruct the competitive forces in an open market. These laws have resulted in increased state regulation of intrastate telecommunications services, have proven difficult to enforce, and have consumed scarce state resources. Serious questions remain whether such regulatory attempts to replicate competitive local market conditions will ever be successful.

The Eighth Circuit has interpreted Section 253(a) of the 1996 Act to preempt the sovereign authority of the States over their political subdivisions in this vital area. The opinion allows individual municipalities and other state instrumentalities to enter into local telecommunications

markets even if a state has made the public policy choice not to permit government competition with private enterprise. The D.C. Circuit and the FCC, in contrast, have determined that Section 253(a) does not preempt the States' authority to prohibit their political subdivisions from providing local telecommunications services. These decisions are better reasoned and promote the pro-competitive goals of the 1996 Act by preserving state control over government entry into such markets.

This Court should grant the petitions and resolve the split of authority between the Eighth Circuit and the D.C. Circuit. A definitive ruling by this Court is necessary for rational implementation of the 1996 Act, will remove the uncertainties created by these and other conflicting judicial decisions for state and local governments and private sector companies, and will protect the interests of consumers by promoting fair and effective competition for their local telecommunications services.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONS PRESENT IMPORTANT ISSUES THAT AFFECT THE INTERESTS OF CONSUMERS AND PRIVATE INDUSTRY MEMBERS NATIONWIDE.

a. Government entry into intrastate telecommunications businesses raises significant competition and public policy questions. If unchecked, market entry by a municipality or other state instrumentality undermines competition for telecommunications services, deters private entrants, and defeats the very purposes of the 1996 Act. The petitions ask whether Section 253(a) is properly interpreted to preserve or preempt state authority in this vital area, based on the statutory language and the pro-competitive objectives of Congress.

The correct answer to that question is critically important to consumers and private sector companies throughout the country.

b. The 1996 Act is designed to promote competition in our nation's communications markets through "accelerate[d] . . . *private* sector deployment of advanced telecommunications and information technologies and services." S. Conf. Rep. No. 104-230, at 113 (1996) (emphasis added). Congress envisioned that, over time, such competition would reduce or possibly eliminate the need for government regulation. *See Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 638 (2002); Federal Communications Commission, *Strategic Plan for the 21st Century*, at 1 (Aug. 1999). Sprint and other private companies have heeded this call, investing hundreds of millions of dollars to develop and expand their wireline and wireless networks in local communities across the country. These investments have created jobs and contributed significantly to the local economies.

Since 1996, an increasing number of municipalities and other state political subdivisions have entered the market for communications services, including local phone, cable, and Internet services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 6-11 & Table 2, *at* http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (Jan. 2001) ("*Telecom Business*"). In juxtaposition to this emerging trend, experience shows that these government forays into communications businesses distort the marketplace and undermine fair and effective competition.

Municipalities and other political subdivisions are able to cross-subsidize their telecommunications offerings in numerous ways. Revenues generated through local taxes and fees can be—and are—used to help fund these "competitive"

ventures.[2] Municipalities can also issue tax-free debt to support their operations.[3] In addition to these direct public subsidies, municipalities enjoy other significant advantages over private competitors. A municipality typically has preferential access to essential public rights-of-way, is exempt from local franchise fees and taxes, and is not subject to the same profit expectations or accounting standards as its private counterparts. *See Telecom Business* at 15.

The public subsidies and other advantages enjoyed by government entrants enable them to undercut private competitors in the provision of local telecommunications services. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers,* 95 Nw. U. L. Rev. 1099 (2001).[4] Yet, residential and business subscribers do not benefit from

[2] The City of Lebanon, Ohio, for example, charges developers of new houses a "Broadband Connection Fee" of $1,250 to subsidize its deployment of a fiber optic network, regardless of whether the homeowner ever subscribes to the City's broadband services. *See Home Builders Ass'n. of Dayton & Miami Valley v. City of Lebanon, Ohio*, Case No. 02CV59491 (Common Pleas Ct., Warren County, Ohio). Sprint and other private competitors have no ability to raise capital through such "fees" in deploying their networks.

[3] For instance, the City of Bristol, Virginia recently announced a $48 million bond offering, at least $11 million of which is earmarked for its local cable and telecommunications system. *See* Mike Still, *Bristol Virginia City Council Gives Blessing to $48.2 Million Bond Issue Plan, at* http://www.bristolnews.com/servlet/Satellite?pagename=BHC%2FMGArticle%2FBHC_BasicArticle&c=MGArticle&cid=1031768984728&path=!news (Mar. 26, 2003).

[4] *See also* David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises* (Working Paper 99-11), at 1-2 (AEI-Brookings Institute Joint Center for Regulatory Studies Nov. 1999) (generally finding that public enterprises "have stronger incentives than profit-maximizing firms to pursue activities that disadvantage competitors").

the "lower" rates offered by a government entity, since they have already subsidized the costs of providing the services through their local taxes. *See* Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network,* at 3 (Progress & Freedom Foundation), *at* www.pff.org/publications/pop9.7guppyclick.pdf (Feb. 2002) ("*Government Entry*"). Private carriers like Sprint, who have spent millions of dollars in building their local networks, are similarly forced to subsidize these "competitive" government operations through the payment of property taxes on their facilities, as well as various franchise fees, pole attachment fees, and rights-of-way fees. The advantages accorded to government providers also deter the entry of private sector companies that may have legitimate competitive advantages, such as technological advances or greater efficiencies, but cannot compete with the publicly-funded government provider. This is particularly problematic in telecommunications, where attaining sufficient scale is key to any competitor's survival. The inequities created by government entry into local telephone markets likewise reduce the incentives for Sprint and other private carriers to invest in new infrastructure and technologies. This impedes the deployment of advanced telecommunications and information services by the private sector, thus undermining one of the primary objectives of the 1996 Act. *See* 47 U.S.C. § 157(a). The unique advantages enjoyed by government providers, therefore, create an "uneven playing field" and ultimately deny consumers the full benefits of competition.

c. At the same time, economists generally agree that government entrants are less efficient than private industry in delivering these types of services. *See, e.g.*, Joseph Stiglitz, *Whither Socialism* 237 (MIT Press 1994); James Q. Wilson, *Bureaucracy* 227 (Basic Books 1989); *Telecom Business* at 12. Whereas a private company must act efficiently to turn a profit or risk closure, a municipality can use public subsidies to continue operating at significant losses. *See Government*

Entry at 4. Government entrants thus lack the normal market incentives to make effective business decisions and are particularly ill-suited to manage competitive operations that involve the kind of advanced technologies and rapid innovations found in the telecommunications industry. *Telecom Business* at 12. Ultimately, taxpayers are forced to bear the risks of these ventures rather than private investors.[5]

Experience to date shows that government-run telecommunications businesses have failed to provide the promised public benefits and economic efficiencies. *See, e.g.*, Ronald J. Rizzuto & Michael O. Wirth, *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Over builds* (GSA Press 1998); *Government Entry* at 5-10; *Telecom Business* at 12-14. Most of these public systems have operated at significant losses, subsidized by local taxpayers, while failing to keep pace with new and cheaper technologies for providing the services. *See Government Entry* at 9-10. In a truly competitive environment, operating at a loss and failing to keep pace with technological advances would drive the inefficient competitor out of the marketplace. But in the case of the government provider, the natural market dynamics are distorted because of the cross-subsidies and other inherent advantages it enjoys.

d. In recognition of the adverse effects on competition and consumers that can result from government entry, many states

[5] The recent turmoil in the telecommunications industry underscores these potential risks. Over the past two years, there have been over eighty bankruptcy filings by private sector telecommunications companies and a market capitalization loss of over two trillion dollars. Yuki Noguchi, *Firm Offers One-Stop Telecom Shopping*, Wash. Post, May 13, 2003; Bob Fernandez, *Telecom Industry Devastated by the Boom that Never Was*, Phila. Inquirer, June 30, 2002. Given the inherently risky nature of the industry, states would be wholly justified in making a public policy decision to keep their political subdivisions from entering into this marketplace.

have enacted laws which restrict or prohibit their political subdivisions from providing local telecommunications services.[6] These laws enable a state to allocate its resources to more traditional means of promoting the deployment of advanced telecommunications services within its borders, such as removing regulatory barriers, helping to develop local infrastructures, and providing other incentives for private entrants to invest in local communities. *Telecom Business* at 16-17 (citing examples). Mississippi, for example, recently enacted a law that provides income and franchise tax credits for investments in broadband equipment. S. 2979, 2003 Reg. Sess. (Miss. Apr. 19, 2003). Such tailored governmental actions provide incentives for private competitors to invest in new telecommunications technology and to deploy their networks in rural communities. And instead of competing against private enterprise, this type of governmental approach stimulates effective competition while reducing the need for state regulation of the services.

States that have permitted market entry by their political subdivisions, on the other hand, have been compelled to enact "level playing field" laws and regulations designed to deter anti-competitive behavior and to protect consumers.[7] Development of these laws requires extensive efforts by state and

[6] *See, e.g.*, Mo. Ann. Stat. § 392.410.7 (West Supp. 2003); Tex. Util. Code §§ 54.001, 54.201 - .202 (Vernon 2002); Ala. Code §§ 11-50B-1 *et seq.* (Supp. 2002); Ark. Code Ann. § 23-17-409 (Michie Supp. 2002); Neb. Rev. Stat. Ann. §§ 86-128(1)(b), 86-575(2) (Michie Supp. 2002); Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001); Tenn. Code Ann. § 7-52-601 *et seq.* (Supp. 2001).

[7] *See, e.g.*, Fla. Stat. Ann. §§ 125.421, 166.047, 196.012(6), 199.183 (1)(b), 212.086(6) (2000 & Supp. 2003); Iowa Code Ann. § 388.10 (West 2002); Minn. Stat. Ann. § 237.19 (West 2002); S.C. Code Ann. § 58-9-2620 (2002); Utah Code Ann. §§ 10-8-14, 10-18-101 - 106, 10-18-201 - 204, 10-18-301 - 306 (2003); Va. Code Ann. §§ 15.2-1500, 56-265.4:4 (Michie Supp. 2002).

local legislative and regulatory officials, as well as private industry. Administration and enforcement of these laws has also proven to be difficult.

In Virginia, for instance, Sprint has been participating in costly, months-long regulatory proceedings in which the City of Bristol, doing business as the Bristol Virginia Utilities Board ("BVUB"), must demonstrate that it has complied with the Commonwealth's "level playing field" requirements. *See* Va. Code Ann. §§ 15.2-2160, 56-265.4:4 (Michie Supp. 2002). The proceedings involve a review of complicated cost studies and other information by the Virginia State Corporation Commission and interested private parties, to ensure that BVUB is not subsidizing its telecommunications services with public funds or revenues and is complying with other "level playing field" requirements. *See* Order, Case No. PUC-2002-00231 (Va. State Corp. Comm'n Dec. 19, 2002). In addition to the specific proceedings involving BVUB, the Virginia State Corporation Commission recently issued administrative rules to implement the Commonwealth's level playing field mandates. The new rules require, among other things, that municipal entrants submit data, on an annual basis, demonstrating that they are not offering telecommunications services below the incremental cost of providing them, and maintain separate books and records for their telecommunications businesses. *See* Order Adopting Rules, Case No. PUC-2002-00115 (Va. State Corp. Comm'n Apr. 9, 2003), 20 VAC 5-417-40. Administration and enforcement of these new rules by the Virginia State Corporation Commission will require extensive state resources each year.

Even with comprehensive "level playing field" laws and regular state administrative oversight, it is virtually impossible to account for all of the potential hidden subsidies and advantages that a municipality or other public entity may enjoy in "competing" for local telecommunications services. *See Telecom Business* at 15 (because most of these subsidies

and other advantages are "hidden from view and difficult or impossible to quantify, the one thing public utilities never do is provide an accurate gauge of the true costs of providing any service"). A prime example of such an advantage is that, unlike Sprint and other private sector incumbents, BVUB has no "carrier of last resort" duties, which obligate a carrier to serve any customers within a specified territory who request local telecommunications services.[8] BVUB can thus choose to serve only the more profitable government, business, and high volume residential customers, leaving to Sprint the burden of providing services to high cost, low volume (often rural) customers. Exempting government providers from the "carrier of last resort" obligations imposed on private sector companies plainly distorts the marketplace and deters private entry.

Given the many inherent advantages enjoyed by government entrants, it is highly unlikely that state regulatory attempts to replicate a "level playing field" will ever result in efficient competition. The only certainty is that government entry requires *increased* state regulation of local telecommunications services, rather than reduced state regulation as envisioned by Congress.

e. The ability of States to control market entry by their local subdivisions, therefore, is critically important to the viability and growth of competition for intrastate telecommunications services. Apart from the fundamental question of state sovereignty raised by the petitions, which has been fully addressed by Petitioners, the important competition and public policy issues implicated by the circuit conflict further warrant review of the case by this Court.

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[8] *See* Letter from BVUB Counsel to Virginia State Corporation Commission of July 8, 2002 (amending BVUB's Application for Certificate in Case No. PUC-2002-00126); Order Granting Certificate, Case No. PUC-2002-00126 (Va. State Corp. Comm'n Nov. 26, 2002).

II. THE QUESTION OF LAW PRESENTED BY THE PETITIONS HAS RESULTED IN CONFLICTING DECISIONS IN AN INCREASING NUMBER OF FEDERAL AND STATE COURTS AND IS RIPE FOR REVIEW.

a. The petitions present a square conflict between the Eighth Circuit and the D.C. Circuit over the proper meaning of a key provision of the 1996 Act. The Eighth Circuit has held that Section 253(a) of the 1996 Act, 47 U.S.C. § 253(a), preempts state laws that prohibit municipalities and other political subdivisions from providing intrastate telecommunications services. (FCC Pet. App. at 6a, 7a). The court found that the words "any entity" in the statute encompass municipalities and evince an unambiguous intent by Congress to preempt state authority in this area, thus satisfying the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (FCC Pet. App. at 7a). Accordingly, the court struck a Missouri statute that precluded market entry by municipalities.

The Eighth Circuit's decision effectively mandates that States allow the entry of individual municipalities and other state instrumentalities into intrastate telecommunications markets. The States, in turn, are powerless to prohibit municipal competition with private enterprise even when state or local policies and circumstances demonstrate that other governmental approaches would better promote fair and effective competition and the deployment of advanced technologies and services. The Eighth Circuit's decision also opens the door for municipalities and other local subdivisions to resist, under the guise of "federal preemption," legitimate efforts by the States to impose "level playing field" conditions on market entry to prevent anti-competitive conduct and to protect consumer interests. Local government entrants can be expected to argue that such state legislative curbs are "barriers to entry" that have the effect of prohibiting their

ability to compete with private companies, thus running afoul of Section 253(a)'s mandates. These disputes will undoubtedly generate additional litigation and will increase the costs and burdens to States and private competitors resulting from the decision.

The D.C. Circuit and the FCC, in contrast, have held that Section 253(a) does not preempt the authority of States to prohibit their political subdivisions from providing telecommunications services. Both the court and the agency found that the words "any entity" in Section 253(a) appear to prohibit restrictions on market entry by independent entities subject to state regulation, and do not evince a plain and unmistakable intent by Congress to intrude on the sovereign power of a state to control market entry by its own political units. Accordingly, the D.C. Circuit and the FCC upheld a Texas statute which generally prohibits municipalities from providing telecommunications services. *City of Abilene, Tex. v. FCC*, 164 F.3d 49, 52-54 (D.C. Cir. 1999).

These decisions are better reasoned and adhere more faithfully to the "plain statement" rule of *Gregory v. Ashcroft*. The term "entity" can mean different things depending upon the context, *see Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding use of term "entity" ambiguous in 47 U.S.C. § 224), and this Court recently found that use of a modifier like "any" in a statute is insufficient evidence of congressional intent to interfere with the sovereign relationship between a state and its political subdivisions, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 542-46 (2002) (interpreting terms "any claim" in determining whether tolling provisions of 28 U.S.C. § 1367(d) applied to state claim dismissed on Eleventh Amendment grounds). By preserving state authority over government entry into local telecommunications markets, the decisions of the D.C. Circuit and the FCC also enable States to promote, rather than undermine, the pro-competitive goals of the 1996 Act.

b. The question presented by the petitions will continue to arise. As shown, other states have enacted similar laws prohibiting or restricting their instrumentalities from entering local telecommunications markets. More states are likely to introduce and enact such legislation in the future, given the crucial competition and public policy issues at stake. *See, e.g.*, S. 321 & H.R. 298, 2003-2004 Reg. Sess. (Pa. 2003) (pending before Pa. General Assembly).

c. Continued consideration of the preemptive scope of Section 253(a) by other courts will not lead to a definitive, coherent view of the law on the question presented. Indeed, the Iowa and Nebraska Supreme Courts have already split along the same lines as the D.C. Circuit and the Eighth Circuit. The Supreme Court of Iowa held that Section 253(a) does not preempt state authority over market entry by municipalities, *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), while the Supreme Court of Nebraska held that the statute preempts such authority, *In re Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb. 2003).[9] Other federal and state courts have also reached conflicting rulings on the same question. *See City of Bristol, Va. v. Earley*, 145 F. Supp. 2d 741, 746-50 (W.D. Va. 2001) (adopting Eighth Circuit position), *vacated*, No. 01-1741 (4th Cir. May 1, 2002) (district court opinion and order vacated, and appeals dismissed as moot by May 1, 2002 Order); *Municipal Elec.*

[9] The Nebraska Telecommunications Association and the Nebraska Cable Communications Association jointly filed a petition for writ of certiorari with this Court to review the Nebraska Supreme Court decision and have requested consolidation with this case. *In re Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb.), *petition for cert. filed*, (U.S. Apr. 30, 2003) (No. 02-1591). A Sprint subsidiary provides local exchange service to approximately 28,000 access lines in Nebraska. Sprint supports grant of the associations' petition in the Nebraska case for the same reasons set forth above.

Auth. v. Georgia Pub. Serv. Comm'n, 525 S.E.2d 399 (Ga. Ct. App. 1999) (adopting D.C. Circuit position), *cert. denied*, No. S00C0601 (Ga. May 1, 2000).

d. The question presented by the petitions, therefore, is ripe for review by this Court. The growing split of authority over the proper meaning and effect of Section 253(a) has created significant uncertainties in the telecommunications industry and, if allowed to stand, will seriously undermine implementation of the 1996 Act and impede the development of effective competition in the local telecommunications market. Resolution of this important question will provide much needed guidance to the FCC, the States and their instrumentalities, and private sector companies like Sprint. It will also ensure that the pro-competitive purposes of Congress are achieved, thereby advancing the interests of consumers and private sector companies around the nation in fair and effective competition for intrastate telecommunications services.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
Petitioners,

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF UNITED STATES TELECOM ASSOCIATION AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The United States Telecom Association ("USTA") is a not-for-profit trade association for the local telephone industry, which represents some 600 facilities-based incumbent wireline providers of local telephone service. USTA has twenty-three members that provide local telephone service in Missouri.[1] The Verizon telephone companies ("Verizon")[2] together are the largest providers of wireline communications in the United States and offer local, long distance, data, and broadband (or high-speed data) services to customers in 49 States and the District of Columbia.

The construction of Section 253(a) of the Communications Act, 47 U.S.C. § 253(a), which was part of the reforms enacted by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act")

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1. Pursuant to Rule 37.6 of this Court, consents of counsel for the Petitioners and for the Respondents have been obtained and filed with the clerk of the Court. No counsel for any party has authored this brief, in whole or in part, and no person or entity, other than the *amici curiae*, their members, or counsel, have made monetary contributions to the preparation or submission of this brief.

2. The following Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. These are: Contel of the South Inc. d/b/a Verizon Mid-States; GTE Midwest Inc. d/b/a Verizon Midwest; GTE Southwest Inc. d/b/a Verizon Southwest; The Micronesian Telecommunications Corp.; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.; Bell Atlantic Communications Inc. d/b/a Verizon Long Distance; NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions; and Verizon Select Services Inc.

directly affects all USTA members and Verizon. A growing number of municipalities throughout the country provide telecommunications services. This trend, as distinct from any other type of competition, raises substantial issues of fairness and competitive neutrality.

Municipal governments control the use of public rights-of-way, and have often misused that authority to require telephone companies to pay exorbitant fees for use of those rights-of-way or to force them to donate conduit or other facilities to the municipality's own use. This directly threatens Congress's goal of creating a level playing field for all telecommunications providers, expressed in Section 253(c), 47 U.S.C. § 253(c), which requires municipalities to administer rights of way "on a competitively neutral and nondiscriminatory basis." Municipalities also wield local taxing authority, which can be used to hobble private competitors and to raise capital outside of the normal discipline of the debt and equity markets. Finally, as recent events in the marketplace amply demonstrate, the telecommunications industry is a risky, capital-intensive business. Municipal government entry into the market, with its potential for support from public funds, creates substantial market uncertainties, suppresses competing private investment, and also can lead to serious municipal budgetary problems.

For all these reasons, *amici* support the right of state governments to limit the authority of their political subdivisions to undertake risky capital investments in competition with entities over which those localities exercise regulatory authority. *Amici* thus have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

The petitions for a writ of certiorari present issues of national importance regarding the proper interpretation of a critical provision of the 1996 Act, over which the federal Courts of Appeals are in direct conflict. Indeed, in their opposition to certiorari, Respondents concede that the issue is an "important" one, Respondents' Brief in Opposition at 1 (filed May 19, 2003) ("Resp. Br."), and further concede a direct conflict between the decisions of the Eighth Circuit and the D.C. Circuit as well as the Supreme Court of the State of Nebraska. *See id.* at 4, 14. The decisions of the Eighth Circuit and the Nebraska Supreme Court are also in conflict with the decisions of the Federal Communications Commission ("FCC"), the agency that Congress charged with administration of this statutory scheme. *See* 47 U.S.C. § 253(d) (giving the FCC authority to adjudicate preemption claims under Sections 253(a) and (b)). Thus, as the Brief in Opposition concedes, the criteria for certiorari are met. *See* Sup. Ct. R. 10 (a)-(b).

The petitions also implicate principles at the core of our national system of dual sovereignty. The Eighth Circuit construed Section 253(a) to impair the power of States to shape and control the activities of their political subdivisions, an essential attribute of state sovereignty. This case does not involve the mere extension of federal law into an area traditionally reserved to the States. Rather, it concerns the much more fundamental question of whether Congress intended in a generally worded statute to strike at the heart of the States' ability to delegate – or not to delegate – power to their own political subdivisions.

Against this background, it is clear that the decision of the Eighth Circuit cannot be squared with this Court's precedent. The Eighth Circuit held that the 1996 Act preempted the Missouri statute solely because Congress used the word "any" to modify "entity" in Section 253(a). *See Mo. Mun. League v. FCC*, 299 F.3d 949, 953-55 (8th Cir. 2002), *petitions for cert. filed*, 71 U.S.L.W. 3568, 3624, 3625 (Feb. 18 & Mar. 20, 2003). In *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991), however, this Court made clear that a federal court may not impute to Congress the intent to interfere with a fundamental aspect of state sovereignty absent a plain statement of such intent. Nothing in the text or history of Section 253(a) suggests a congressional desire to intrude into state sovereignty in this drastic way. To the contrary, the more limited purpose of Section 253(a) was to prevent both State and local governments from erecting barriers to the provision of telecommunications services by private entities within their jurisdiction. The Eighth Circuit's interpretation of *Gregory*, if permitted to stand, would effectively read the plain-statement rule out of existence and allow courts to presume that Congress, *sub silentio*, intended to interfere with matters that lie at the core of state sovereignty.

The Missouri statute reflects a legitimate concern over whether its subdivisions should be engaged in risky, capital-intensive enterprises outside of their traditional role of local governance. Missouri and at least eleven other States have passed laws prohibiting or restricting the provision of telecommunications services by political subdivisions. These laws represent a collective legislative judgment in those States that municipalities – which enjoy unfair advantages over private competitors, are in many cases ill-suited for the demands of the private marketplace, and whose entry into risky commercial enterprises would jeopardize public funds

– should not be authorized to enter the telecommunications business. Nothing in the 1996 Act strips Missouri or any other State of the right to make fundamental choices about the operations of their own political subdivisions, which by their very nature exercise only that authority delegated to them by the State. This Court's intervention is necessary to correct the Eighth Circuit's errors and ensure a uniform, national rule on which both States and private companies can rely.

ARGUMENT

I. THE DECISION BELOW FAILS TO RECOGNIZE THAT STATES HAVE COMPELLING REASONS TO PROHIBIT OR LIMIT THEIR POLITICAL SUBDIVISIONS' PROVISION OF TELECOMMUNICATIONS SERVICES.

The Missouri statute legitimately responds to a relatively recent development in the telecommunications industry: municipalities that offer traditional telephone, cable, Internet access, or broadband services in competition with private industry.[3] A study released in January 2001 estimated that 61 municipalities offered Internet access services, 32 provided high-speed data services, and 18 offered local dial tone services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, 8.1 Progress on Point 18-23 (Jan. 2001), *at* http://www.pff.org/

3. The Missouri statute provides, in relevant part: "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service . . . ." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003). The statute was extended by the Missouri legislature in July of 2002 and now has an expiration date of August 28, 2007. *See Mo. Mun. League*, 299 F.3d at 952 n.3.

POP8.1GovtTelecom011001LOGO.pdf. These numbers since have increased dramatically. The American Public Power Association has reported that, at the end of 2002, over 500 public utilities offered some type of broadband telecommunications services – from fiber leasing to Internet access to local telephone service. *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), *at* http://www.appanet.org/pdfreq.cfm?PATH_INFO=/LegislativeRegulatory/Broadband/Telecom%20Fact%20Sheet_1-2003.pdf&VARACTION=GO. This trend is expected to continue as more and more municipalities and local governments consider building telecommunications and broadband networks. *See, e.g., Large Number of Municipal Utilities Eying the Broadband Market*, Communications Daily, Apr. 1, 2003.

In response to this trend, at least twelve States, including Missouri, have passed laws that prohibit or restrict political subdivisions from entering the telecommunications market.[4]

4. These states are: Arkansas (Ark. Code Ann. § 23-17-409 (Michie 2002)), Florida (Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003)), Minnesota (Minn. Stat. Ann. § 237.19 (West 2002)), Nevada (Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001)), South Carolina (S.C. Code Ann. § 58-9-2600 (2002)), Tennessee (Tenn. Code Ann. §§ 7-52-601 to -611 (Supp. 2001)), Texas (Tex. Util. Code Ann. §§ 54.201-261 (Vernon 2002)), Utah (Utah Code Ann. §§ 10-18-101 to -306 (2003)), Virginia (Va. Code Ann. § 15.2-2160 (Michie Supp. 2002)), and Washington (Wash. Rev. Code § 54.16.330 (2003)). In addition, the statute at issue in the case before the Nebraska Supreme Court was intended to limit the provision of telecommunications services by municipalities. *In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 371-72 (2003), *petitions for cert. filed*, 71 U.S.L.W. 3709 (Apr. 30 & May 1, 2003).

These laws range from outright bans on the provision of telecommunications services by municipalities to procedural protections that municipalities must satisfy before they may offer such services.[5] As discussed below, ample justifications exist for these prohibitions and conditions of service.

A. Because municipalities are governmental entities with delegated state police powers at their disposal, local governments that compete directly with private companies enjoy several unfair advantages. First, municipalities control access to the public rights-of-way and may leverage that control to exclude or disadvantage private companies that compete with them. Second, municipalities are also often exempt from the fees, taxes, and regulatory requirements to which private companies are subject. Third, municipal telecommunications enterprises may interfere with statewide regulation of telecommunications services, which most States have lodged exclusively in a statewide public service commission. Finally, municipal entry into the marketplace suppresses private investment, because it creates regulatory uncertainty and introduces a competitor who can raise funds through the exercise of sovereign power outside the normal constraints of the capital and debt markets.

5. *See, e.g.*, Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003) (imposing taxes on prices of telecommunications services provided by public entities); Minn. Stat. Ann. § 237.19 (West 2003) (requiring municipalities to obtain 65% super-majority of voters before providing telecommunications services); Tenn. Code Ann. § 7-52-602 (Supp. 2001) (requiring municipalities to meet disclosure and voting requirements); Va. Code Ann. § 15.2-2160 (Michie Supp. 2002) (requiring localities providing telecommunications services to publish annual financial statements and to estimate taxes and other fees that they would have to pay were they for-profit providers, and mandating that they give private providers nondiscriminatory access to public rights-of-way, poles, conduits, and other publicly owned facilities).

In most areas, municipalities have the ability to set the terms and conditions for their competitors' access to public rights-of-way. The 1996 Act grants States and municipalities the authority to manage the public rights-of-way and to require "fair and reasonable compensation" for their use.[6] Under this system, private companies must apply to municipalities for permission to access streets, sidewalks, utility poles, conduits, or public lands in order to install cable and wires. In exchange for this access, private companies pay local governments a fee. Rights-of-way fees, however, vary widely from place to place. In some areas, despite the 1996 Act's mandate that municipalities charge only "fair and reasonable compensation," municipalities often assess rights-of-way fees that are unrelated to the costs of maintaining the rights-of-way but based instead on revenue or "rent." *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001) (holding that rights-of-way fees based on a percentage of private companies' gross revenues violate Section 253(c)), *cert. denied*, 534 U.S. 1079 (2002). Local governments may use this regulatory authority over the public rights-of-way to discriminate against private competitors. They may charge excessive rights-of-way fees before granting private companies permission to lay wire or access utility poles, charges that private companies must absorb or pass

6. 47 U.S.C. § 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

along to customers through higher rates or charges. Or municipalities may impose onerous permit or application requirements that complicate or delay competitors' access to the public rights-of-way. And municipalities may exempt themselves from the very same requirements that they impose on private companies. A city in Florida, for example, after beginning to compete with the city's incumbent cable provider, required the private cable company to pay five percent of its gross revenues as a franchise fee, a fee which the municipality in turn exempted itself from paying. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 N.W. U. L. Rev. 1099, 1118 (2001).

Municipalities may also require private companies to provide free conduit or other facilities as a condition for access to public rights-of-way, thus misusing regulatory authority to gain a zero basis asset for municipal use in competition with private companies.[7] Municipal provision of telecommunications services thus creates incentives directly contrary to Congress' command that localities

7. Numerous federal court decisions have struck down requirements that private companies build and dedicate telecommunications facilities to municipalities as a condition for placing private telecommunications infrastructure under the city streets. *See, e.g., City of Auburn*, 260 F.3d at 1179 (*citing AT&T Comm. of S.W., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998)); *see also Qwest Corp. v. City of Santa Fe, N.M.*, 224 F. Supp. 2d 1305, 1309, 1330-31 (D.N.M. 2002) (holding that Section 253 preempts local requirement that private provider "dedicate all conduit laid upon the City's property to the City" and upon installation of new conduit "install double the amount of capacity needed for the applicant's own use").

administer rights-of-way "on a competitively neutral and nondiscriminatory basis." *See* 47 U.S.C. § 253(c).

Municipalities also enjoy a host of other advantages over private companies. Local governments may issue tax-free, interest-free or reduced interest loans in order to raise capital or pay operating expenses. They are not subject to property or corporate income taxes like private companies. Municipalities also have the ability to raise taxes to subsidize losses or maintain artificially low rates or to shift costs to customers of electric or other services where the municipality faces no competition. Further, by virtue of their "inside" status, municipalities may enjoy preferential treatment for municipal contracts or have access to knowledge of bidding processes for other government projects. Municipalities may require that local telecommunications services be provided by the municipal enterprise, thus excluding private companies from competition for that business.

These unfair advantages deter private sector investment – and thus undermine a central goal of the 1996 Act. The 1996 Act was passed to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996) (emphasis added). The FCC also has recognized that "only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate." *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking, FCC No. 99-141, 14 F.C.C.R. 12,673, ¶ 4 (1999); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, ¶ 110 (1999) ("fundamental

goal of the Act" is the promotion of facilities-based competition, investment, and innovation). The 1996 Act thus envisioned competition among private companies offering services via their own equipment and facilities, and the focus of the 1996 Act was on creating competition among multiple private providers through the development of facilities-based services.

For this goal of facilities-based competition to be realized, private companies *must* have incentives to invest the enormous up-front capital that such equipment and facilities necessarily require. Private industry has little economic incentive to invest in upgrading networks or building out new facilities in areas in which municipalities have an unfair advantage over competitors or where the return on those investments is undermined by artificially subsidized rates. Thus, a State such as Missouri might rationally conclude that municipal provision of telecommunications services is not worth the candle, and instead focus its telecommunications policy on the encouragement of private investment in new infrastructure.

B. State laws prohibiting municipal telecommunications enterprises are also justified as a means of ensuring that public funds are not placed at risk through commercial investments by municipalities. States clearly have an interest in protecting the coffers of their political subdivisions, since States could be forced to bail out failed municipal ventures or rescue localities from insolvency. Telecommunications is a volatile, technologically complex, and capital-intensive industry. News accounts are filled with examples of municipal-owned networks that have lost money, diverted funds from other pressing priorities, and overburdened taxpayers.

For example, in the late 1990s the city of Eugene, Oregon, planned an 800-mile digital telecommunications network. The city scrapped those plans several years later when it concluded that its original estimate of $6 million was too low and that its network actually would cost $240 million to complete. Janet Colwell, *Broadband's Broad Price Tag: Faced With Hard Numbers, Eugene is Scaling Back Plans for a Citywide Telecom Network*, Oregon Business, Apr. 1, 2001, at 39. In Tacoma, Washington, the city built a fiber-optic high-speed network called "Click!" In 1997, the city's budget estimate for the project was $40 million. By the year 2000, the city's costs had more than doubled, to almost $90 million, and Tacoma Public Utilities was forced to assess a 50% surcharge on customer bills. Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, 9.7 Progress on Point 5-6 (Feb. 2002), *at* www.pff.org/publications/pop9.7guppyclick.pdf. Similarly, in Grant County, Washington, a public utility raised electricity rates to subsidize losses from its telecommunications operations. Although the utility had invested $60 million in a fiber-optic network that served 9,000 households, in early 2003 only 4,100 households had purchased Internet, telephone or television services from the municipal utility, and officials projected a scant $2 million in revenues for 2003, revenues which were not expected to cover operations and maintenance. Bert Caldwell, *Utilities May Want To Move Slowly*, The Spokesman-Review, Apr. 10, 2003, at A-16.

States must be permitted to decide whether their political subdivisions can or should compete in the private marketplace, as Missouri has done here. Indeed, at the end of the day, a State may well be liable for its political subdivisions' investment "mistakes" in this rapidly evolving

and competitive market. All courts that have considered the question agree that the power of a State to oversee and control the activities of its localities is an essential aspect of sovereign authority. Entirely absent from the Eighth Circuit's decision, however, is the recognition that the Missouri legislature has both the responsibility and the right to weigh these concerns and determine that the telecommunications marketplace is best left to non-governmental providers.

II. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE EIGHTH CIRCUIT'S ERROR OF STATUTORY CONSTRUCTION AND ITS REFUSAL TO PROPERLY APPLY THE PLAIN-STATEMENT RULE.

The questions presented in the petitions for certiorari raise important issues of statutory construction and federalism, over which the federal Courts of Appeals have issued conflicting opinions. The Eighth Circuit's conclusion that Section 253(a) evinces an intent by Congress to interfere with a State's authority to control its political subdivisions upsets the constitutional balance between the federal government and the States. The decision below badly misconstrues this statute and misapplies the plain-statement rule of *Gregory v. Ashcroft*. As a result, the Eighth Circuit's ruling sets a dangerous precedent that other lower courts may use to improperly infer congressional intent to interfere with core state functions.

A. The Constitution creates a system of dual sovereignty between the federal government and the States. "'States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" *Gregory v. Ashcroft*, 501 U.S. 452, 457

(1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Under this system, the federal government has limited, enumerated powers, and the States retain all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X.

These include the power to prescribe the qualifications of a State's own officers, the power to control its political processes, and the authority implicated here – the power to regulate the activities of its political subdivisions. As this Court long has recognized, the State's power to organize itself into subdivisions and to delegate (or not to delegate) its powers to those subdivisions is a core structural authority that affects the State's exercise of all its substantive powers. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("[w]hether and how" to subdivide and delegate substantive power "is a question central to state self-government"); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States have "wide latitude . . . in creating various types of political subdivisions and conferring authority upon them"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature, and duration of the powers conferred upon [political subdivisions] . . . rests in the absolute discretion of the state."). Thus, among the most sacrosanct of a State's powers are those of self-organization, i.e., the manner in which a "state defines itself as a sovereign." *Gregory*, 501 U.S. at 460.[8]

8. Given that the State's power to organize itself into governmental units is a core attribute of state sovereignty, Respondents' emphasis on *Salinas v. United States*, 522 U.S. 52 (1997), is misplaced. *See* Resp. Br. at 2, 6-9. The statute at issue in *Salinas* did not involve federal intrusion into the States' ability to organize their own structure of governance. *See Salinas*, 522 U.S. at 60-61. Here, by contrast, the Eighth Circuit read Section 253(a)

(Cont'd)

Congress may, of course, legislate in areas traditionally governed by the States if those areas are otherwise within the scope of its enumerated powers. Congress did just that in enacting the 1996 Act. For most of the twentieth century, local telephone service was treated as a natural monopoly and was provided under a system of exclusive local franchises granted by the States. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act created a new "national policy framework" for regulation of local competition that supplanted the state-run franchise system. *Id.* Under this framework, States have an important – but circumscribed – role in the new federal regime.

For example, Sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251-252, both 1996 Act additions, allocate limited responsibilities to the state public utility commissions. *Id.* Section 251 establishes that incumbent carriers must allow other carriers to interconnect with their facilities and equipment and requires incumbents to share parts of their networks with competitors. *Id.* § 251(a)-(c). Section 252 grants state commissions the power to arbitrate disputes and to approve (or reject) these "interconnection agreements" according to federal standards. *Id.* § 252(b)-(c). States are also charged with setting specific pricing standards for unbundled network elements in conformance with the price standards set out in the 1996 Act and the FCC's governing rules. *Id.* § 252(d); *Iowa Utils. Bd.*, 525 U.S. at 371-73.

Out of respect for our national system of dual sovereignty, this Court repeatedly has required that any

(Cont'd)
to drive a wedge between the State and its own political subdivision, creating rights in the political subdivision that may be asserted against the State and overriding the State's choice of what rights and duties to devolve upon the subdivision.

Congressional enactment that alters the constitutional balance between the federal government and the States be "unmistakably clear." *Gregory*, 501 U.S. at 460 (internal quotations and citations omitted). Thus, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the States absent a clear expression of congressional intent to do so. *Id.* This rule not only protects the proper balance of power between the federal government and the States, it also effectuates "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). As applied in the context of state authority to create and define the powers of political subdivisions, the rule teaches that "federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units." *City of Columbus*, 536 U.S. at 440.

B. The relevant language of Section 253(a) does not approach the unmistakable clarity necessary to satisfy the plain-statement rule. Section 253(a) provides, in relevant part: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). On its face, Section 253(a) says nothing about whether Congress intended the term "entity" to extend to the political subdivisions of a State. The term "entity" is not defined in the 1996 Act, nor was the meaning of the phrase "any entity" the subject of congressional testimony or reports. As the D.C. Circuit observed in reviewing the language of Section 253(a), "it was not plain to the [FCC], and it is not plain to us," that Section 253(a) was meant to

include political subdivisions. *City of Abilene v. FCC*, 164 F.3d 49, 54 (1999).

On the contrary, both the purpose and the structure of the 1996 Act make clear that Congress intended the term "entity" in Section 253(a) to apply to private companies, not municipalities. As explained above, the 1996 Act was enacted to stimulate competition in the private sector and to encourage competition between private companies. *See supra* p. 10 (quoting S. Conf. Rep. No. 104-230, at 1 (1996) (1996 Act was passed to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition") (emphasis added)). Section 253(a) in particular was enacted to "end[] the States' longstanding practice of granting and maintaining local exchange monopolies." *See Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., dissenting).

The word "entity" as used in Section 253(a) thus was intended to refer to private companies, including those who prior to the passage of the 1996 Act were excluded from the telecommunications market by the state-sanctioned local franchise system. The statute was designed to protect private entities from state or local regulation that excluded private competitors or attempted to advantage or disadvantage one private competitor over another. Section 253(a) accordingly removed the barriers to private competition that had previously existed in state and local laws, required any state regulation of those private companies to be applied on a competitively neutral and nondiscriminatory basis, and granted the FCC authority to preempt state or local

regulations that prevented new private competitors from entering the local exchange market. *See, e.g., City of Auburn*, 260 F.3d at 1170.[9]

The Eighth Circuit's contrary conclusion ignores both the structure and purpose of Section 253(a) and this Court's repeated admonitions regarding the need for an exceedingly plain statement before a congressional intent to interfere in core state functions is inferred. The Eighth Circuit reached this erroneous result by myopically focusing on the use of the adjective "any" in Section 253(a). But as the Court recently made clear, use of the modifier "any" does not, without more, satisfy *Gregory*'s plain-statement rule. In *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), the Court examined the scope of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations for "any claim" that a federal court dismisses under its supplemental jurisdiction. The issue before the Court was whether Section 1367(d) applied to claims against non-consenting States that are ultimately dismissed on Eleventh Amendment grounds.

This Court held that, although Section 1367(d) pertains on its face to "any" claim, it could not be read to apply in the context of suits against States:

> With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any

9. Indeed, in Section 253(a) itself Congress prohibited not only state but also "local" regulation that creates barriers to market entry. Congress thus put *all* governmental authority – state and local – on one side of the Section 253(a) equation and private entities providing telecommunications services on the other. In addition, Congress specifically used the term "local government" in both Sections 253(c) and (d), *see* 47 U.S.C. § 253(c)-(d), further indicating that the word "entity" was not meant to encompass "local governments" in this statute.

> claim "asserted" under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. Instead, we held that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Likewise, §1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . .

Id. at 544-45 (citations omitted) (alteration in original).[10]

Raygor reinforces tne principle that *Gregory* requires more than use of the word "any"; it requires an affirmative indication that Congress clearly intended to intrude into matters at the heart of state sovereignty. No such indication exists here. As the D.C. Circuit made clear in its opinion, the fact that it is "linguistically possible to include a municipality under the heading 'entity'" is not a sufficient basis to find preemption. *City of Abilene*, 164 F.3d at 52. "If it were, *Gregory*'s rule of construction would never be needed." *Id.* at 53.

10. Obviously, the harm to state sovereignty at issue in *Raygor* – relaxation of a state statute of limitations – pales in comparison to the intrusion into state sovereignty that the Eighth Circuit found implicit in Section 253(a), which goes to the heart of a State's authority to decide which powers to delegate (or not to delegate) to its political subdivisions.

The Court should grant certiorari to correct the Eighth Circuit's misapplication of *Gregory* and to reinvigorate the plain-statement rule, which will in turn ensure that States retain their sovereign power to make choices about their governmental structures and thereby ensure the responsible operations of their political subdivisions.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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In the
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Petitioner,

v.

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Respondents,

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v.

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Respondents,

Southwestern Bell Telephone Company,
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v.

Missouri Municipal League, *et al.*
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND FOR AFFIRMANCE

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CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND FOR AFFIRMANCE

The City of Abilene, Texas ("Abilene" or "City") and the Texas Coalition of Cities for Utility Issues ("TCCFUI") (together "*Amici*") respectfully submit this Brief *Amici Curiae* in support of petitioners' request for review.[1] Upon review, Abilene and TCCFUI urge affirmation of the Eighth Circuit's decision.

INTEREST OF *AMICI CURIAE*

The City of Abilene, Texas is a "home rule city" under the Constitution and laws of the State of Texas with a population of approximately 116,000. Abilene is located 120 miles west of Fort Worth, Texas, the closest major metropolitan area. It is Abilene's August 15, 1996, petition for preemption to the Federal Communications Commission ("FCC" or "Commission") which is the subject of *City of Abilene, Texas v. Federal Communications Commission*, 164 F.3d 49 (D.C. Cir. 1999). Accordingly, Abilene offers first hand experience in how the D.C. Circuit's opinion thwarts Congress' determination that the nation's telecommunications needs are best served through competition. Abilene's interest is, and always has been, to ensure that its citizens and businesses have access to technologically advanced telecommunications services.

TCCFUI[2] is a coalition of approximately 110 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The coalition is comprised of large municipalities and rural villages. TCCFUI monitors the activities of the Texas Legislature, the Public Utility Commission, the Railroad Commission, and the

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[1] No person or entity other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief and the letters of consent have been filed with the Clerk of the Court.

[2] A list of TCCFUI's member Cities is found on Attachment A.

Federal Communications Commission on utility issues of importance to cities. One of the principal purposes of TCCFUI is to ensure that the citizens of Texas enjoy quality utility service, including telecommunications services. Members of TCCFUI compete nationally and internationally for business development. TCCFUI supports the efforts of Abilene and similarly situated municipalities to bring the benefits of competition in the telecommunications arena to smaller cities and towns.

ARGUMENT

1. The Petitions For Writ Of Certiorari Should Be Granted

It is undeniable that the decisions of the D.C. Circuit and the Eighth Circuit are in clear conflict. The legal ramifications of this split in decisions have been briefed by Petitioners and will not be repeated here. In addition, Petitioners adequately outline the problems attributed to this conflict that impact the states, private companies, and the FCC.

Municipalities, too, are adversely impacted by the conflicting opinions. From the perspective of municipalities in Texas, the current state of the law is untenable. Missouri's prohibition against municipalities engaging in telecommunications services has been preempted, while Texas' blanket ban, which even prevents municipal contracts with private telecommunications companies, remains in effect. The availability of modern telecommunications services is essential to the provision of municipal services and to the economic viability of a community. States and municipalities often compete fiercely with each other for industry and business. Business location decisions may be determined by whether there exists an up-to-date telecommunications infrastructure and by the quality of the local educational system. The educational system of the community may be judged on whether enhanced telecommunications services are available in the schools.

Cities and towns in Missouri and other states in the Eighth Circuit are free to take steps to upgrade infrastructure, contract with private companies, and generally foster telecommunications competition as Congress intended. Meanwhile, Texas law remains a barrier to telecommunications competition in Texas' cities, especially those located in sparsely populated areas of the state.

The conflict in preemption decisions has produced an unlevel playing field as municipalities endeavor to attract business and increase commerce. The preemption of state laws barring municipalities from ensuring advanced telecommunications services should not depend upon geography. Such statutes should be uniformly preempted.

The conflict of decisions on this issue promotes forum shopping, creates confusion for the federal agency charged with implementing Congress' telecommunications policy, and ensures a competitive advantage to those municipalities located in states where bans to participation have been preempted. Certainly, Congress intended that national telecommunications policy be uniformly implemented. The Eighth Circuit's interpretation that municipalities are included in the phrase "any entity" has the effect of promoting competition as Congress no doubt intended. The D.C. Circuit's narrow view that "any entity" means "private entity" erects an impassable roadblock to competition. Only one of the circuit courts is correct and will accomplish the goals of Congress. How much longer must the smaller, rural towns and their citizens be denied the opportunity to enjoy the benefits of telecommunications competition? *Amici* urge the Court to grant the petitions and review the decision of the Eighth Circuit.

2. The Eighth Circuit's Opinion Should Be Affirmed

Amici's agreement with Petitioners ends with the proposition that the Court should review the decision of the Eighth Circuit. Unlike Petitioners, *Amici* urge the Court to affirm the Eighth Circuit's opinion. Those entities that suggest the D.C. Circuit's decision denying preemption of Texas law is the "better view" are badly mistaken. The D.C. Circuit erroneously focused on Congress' "tone of voice" when interpreting 47 U.S.C. § 253(c).[3] The D.C. Circuit's interpretation of "any entity" disregards the plain meaning of the language used by Congress, fails to account for the fundamental intent of Congress to promote competition and ignores the role municipalities are willing to take to fill the gap in the provision of competitive telecommunications

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[3] *City of Abilene v. FCC*; 164 F.3d 49, 52.

services.[4] The D.C. Circuit's opinion has resulted, as predicted, in depriving smaller, rural communities of the benefits of competition in the telecommunications arena.

A case in point is the situation of the City of Abilene, a community whose economic growth and vitality have been diminished by the D.C. Circuit's opinion. In 1996 the Mayor's Task Force on Technology was formed in Abilene to explore the technological needs of Abilene. It was a broadly based committee comprised of citizens, civic organizations and businesses. The mission of the Task Force was "[t]o assure Abilene's place on the Information Superhighway."[5] As a result of the work of the Mayor's Task Force, Abilene viewed the construction of modern telecommunications infrastructure as a pathway to the City's economic vitality, similar to the manner in which highways and roads in the past were considered the cornerstone for economic growth of a city. Abilene had a vision to "enrich the lives of all area citizens, businesses, governmental entities and schools by empowering them to use worldwide knowledge bases."[6] Abilene's plan to upgrade the telecommunications infrastructure was to benefit schools, libraries, healthcare facilities and businesses.

However, plans to achieve the vision and goals of the Task Force were stopped dead in their tracks when the local exchange monopoly, Southwestern Bell Telephone Company ("SWBT"), informed the City that it was unwilling to make the investments in its system to meet such goals. On August 15, 1996, Abilene petitioned the FCC for preemption of Texas' law prohibiting municipalities from filling in the gap and providing and/or contracting for telecommunications services.[7]

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[4] The FCC conceded that "municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." FCC Petition at 4.

[5] Report of Mayor's Task Force on Technology, September 26, 1996.

[6] *Id.*

[7] At the time it was considering Abilene's petition, the FCC also had before it the petition of ICG Access Services, a provider of telecommunications services. The City of San Antonio, Texas had entered into a contract with ICG to jointly construct and operate a telecommunications network. The Texas Attorney General, however, determined that such government/private sector cooperation violated Texas law. *See,* Op. Tex. Att'y Gen. No. DM-391 (1996). The Texas

At the FCC, Abilene predicted in its comments that without preemption of Texas' total ban on municipalities' offering telecommunications services, "less densely populated areas will never see the benefits of competition."[8] No crystal ball was needed for such prediction, only a little history lesson learned from the electric industry's course of conduct in Texas. Approximately 75 rural electric cooperatives were established in Texas because the for-profit electric companies declined to serve sparsely populated areas of the state. History has repeated itself as SWBT and other carriers have decided over the years to invest in the larger metropolitan areas where the profit margins are greater, leaving smaller, rural communities to fend for themselves.

It is telling that seven years after enactment of the Telecommunications Act of 1996, an outstanding question is whether ***all*** customers and businesses, even those located in less populous areas of Texas, will ***ever*** enjoy the benefits of competition that Congress surely intended. Abilene believed in 1996, and it believes today, that Congress meant to create an environment where telecommunications competition could flourish and that ***all*** citizens would benefit from such competition via investment in modern infrastructure. Abilene, and no doubt other

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statute, then, prohibits a municipality from contracting with private companies for telecommunications services.

[8] *The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Co., Inc., Teleport Communications Group, Inc., City of Abilene, Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, Reply Comments of City of Abilene, Texas (filed October 21, 1996). The City of Garland, Texas, provided competitive electric service to its citizens and filed comments with the Commission concurring with Abilene's concerns. *See also, Id.* at *Comments of City of Garland, Texas in Support of Petition of City of Abilene, Texas for Expedited Declaratory Ruling*, (filed October 10, 1996). The Cities of LaGrange, Texas, Brenham, Texas, Georgetown, Texas, and Fredericksburg, Texas made similar predictions. *See also, Id.*, Comments filed July 3, 1996 ("these cities believe that the local exchange companies and the interexchange customers will focus most, if not all, of their marketing efforts in the areas with the largest populations and the highest probability of near term growth").

similarly situated cities, have been ready and willing to work with the private sector to include its citizens and businesses in the telecommunications revolution. The Texas statute, the FCC, and the D.C. Circuit have worked together to destroy Abilene's telecommunications vision and to deprive it and its citizens of the benefits of competition.

CONCLUSION

The petitions for writs of certiorari should be granted. The Eighth Circuit's opinion should be affirmed as the law of the land.

Respectfully submitted,

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Attachment A

Abernathy
Addison
Alamo
Allen
Andrews
Arlington
Austin
Balcones Heights
Belton
Big Spring
Bowie
Breckenridge
Brenham
Brookside Village
Brownfield
Brownwood
Buffalo
Burkburnett
Canyon
Carrollton
Cedar Hill
Center
Cisco
Clear Lake Shores
Cleburne
College Station
Conroe
Corpus Christi
Cottonwood Shores
Crockett
Dallas
Denison
Dickinson
El Lago
Electra
Fairview
Flower Mound
Fort Worth
Fredericksburg
Friendswood
Georgetown
Grand Prairie
Grapevine
Greenville
Gregory
Groves
Harlingen
Henrietta
Hewitt
Huntsville
Irving
Jacinto City
Jamaica Beach
Kilgore
LaGrange
La Joya
Lampasas
Lancaster
Laredo
League City
Levelland
Lewisville
Longview
Los Fresnos
McAllen
Mexia
Midlothian
Missouri City
Navasota
Nolanville
North Richland Hills
Palacios
Pampa
Paris
Pearsall
Plainview
Plano
Port Neches
Ralls
Refugio
Reno
Richardson
River Oaks

Rosenberg
San Marcos
San Saba
Selma
Seminole
Seymour
Smithville
Snyder
South Padre Island
Spearman
Stephenville
Sugar Land
Sunset Valley
Taylor Lake Village
Terrell
The Colony
Thompsons
Timpson
Town of Westlake
Trophy Club
Tyler
University Park
Victoria
Waxahachie
Webster

Supreme Court, U.S.
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Nos. 02-1238, 02-1386 and 02-1405

In the Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

SOUTHWESTERN BELL TELEPHONE, L.P., FKA SOUTHWESTERN BELL TELPHONE COMPANY, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether 47 U.S.C. 253(a), which provides that "[n]o State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service," preempts a state law prohibiting political subdivisions of the State from offering telecommunications service to the public.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America. The State of Missouri, which intervened in the court of appeals, separately filed a petition. Southwestern Bell Telephone, L.P., fka Southwestern Bell Telephone Company, also intervened below and separately filed a petition. The Missouri Municipal League, Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Sikeston, Missouri, Columbia Water & Light, and the American Public Power Association were the petitioners in the court of appeals, and are the respondents here. The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as amici in the court of appeals.

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In the Supreme Court of the United States

No. 02-1238

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 299 F.3d 949. The decision of the Federal Communications Commission (Pet. App. 14a-45a) is reported at 16 F.C.C.R. 1157.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2002. Petitions for rehearing were denied on November 20, 2002. Pet. App. 46a. On February 10, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari in Nos. 02-1386 and 02-1405 to and including March 20, 2003. The petition for a writ of certiorari in No. 02-1238 was filed on February 18, 2003. The petitions for a writ of certiorari in Nos. 02-1386 and 02-1405 were filed on March 20, 2003. The Court granted the petitions for a writ of certiorari and consolidated the three cases on June 23, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253 of the federal Communications Act of 1934, 47 U.S.C. 253, and Section 392.410(7) of Vernon's Annotated Missouri Statutes (West Supp. 2003), are reprinted at Pet. App. 47a-49a.

STATEMENT

1. For most of the twentieth century, the provision of local telephone service in the United States "was thought to be a natural monopoly," and "States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC)." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress sought to end that "longstanding regime of state-sanctioned monopolies," *ibid.*, when it enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, and "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 638 (2002).

The provision of the 1996 Act at issue in this case, 47 U.S.C. 253(a), furthers the statute's design of fostering competition in local markets by abolishing all state exclusive-franchise laws. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The statute further provides that "[i]f * * * the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) * * *, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. 253(d). The Federal Communications Commission (FCC or Commission) has executed that directive by, for example, preempting the enforcement of a state statute that shielded rural incumbent telephone carriers from competition from other private providers of local telephone service. See *Silver Star Tele. Co.*, 12 F.C.C.R. 15,639 (1997), recons. denied, 13 F.C.C.R. 16,356 (1998), aff'd *sub nom. RT Communications, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000).

2. This case arises on review of an FCC decision finding that Section 253(a) does not preempt a Missouri statute that prohibits the State's political subdivisions from providing telecommunications services. The FCC's decision relied heavily on an earlier decision involving a similar Texas statute. In *In re Public Utility Commission*, 13 F.C.C.R. 3460 (1997), the FCC addressed a petition by Texas municipalities (but not municipally owned utilities) that urged the Commission to use its authority under Section 253(d) to hold pre-

empted a number of provisions of Texas law that were alleged to violate Section 253(a). One challenged provision "generally prohibit[ed] municipalities or municipally-owned electric utilities from offering for sale, directly or indirectly, certain telecommunications services." 13 F.C.C.R. at 3540. Limiting its ruling to the application of the state statute to municipalities themselves (rather than municipally owned utilities), *id.* at 3544, the Commission found that "preempting the enforcement of [the challenged provision] would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Ibid.*

The Commission explained that the challenged law "is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions," and that this Court's decision in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), held that such "fundamental state decisions" remain within the State's authority "absent a clear indication of intent." 13 F.C.C.R. at 3545-3546. In reaching that conclusion, the Commission distinguished "the question of whether federal standards may be applied to an arm of a Texas municipality," which would not be subject to the *Gregory* rule, from the question whether the State may "define the scope of the authority delegated to a state's own political subdivisions," which is subject to the *Gregory* rule. *Id.* at 3546. Applying that rule to Section 253(a), the Commission was unable to find that the use of the term "any entity" in Section 253(a) constituted a sufficiently clear statement that Congress specifically intended to include municipalities within the scope of Section 253(a) preemption and thereby intrude into the scope of authority that a State may

delegate to its own political subdivisions. *Id.* at 3546-3549.

Although ruling that the Texas statute was not preempted, the Commission "encourage[d] states to avoid enacting absolute prohibitions on municipal entry into telecommunications," because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." 13 F.C.C.R. at 3549. The Commission acknowledged "that entry by municipalities * * * may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias." *Ibid.* But the Commission stated its belief "that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry." *Ibid.*

In *City of Abilene* v. *FCC*, 164 F.3d 49 (1999), the D.C. Circuit affirmed the FCC's decision concerning the Texas law. The court agreed with the FCC that "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*," because "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *Id.* at 52. The court accordingly held that it must "be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services" before Section 253(a) may be applied to do so. *Ibid.* The D.C. Circuit concluded that "it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category 'any entity.'" *Id.* at 54. Accordingly, the D.C. Circuit agreed with the Commission that Section 253(a) does not preempt the Texas statute.

3. This case involves a Missouri statute similar to the statute at issue in *City of Abilene*. The Missouri statute provides that "[n]o political subdivision of this state shall provide or offer for sale * * * a telecommunications service," with exceptions for, inter alia, "Internet-type services." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003).[1] Like the state law at issue in the Texas proceedings, the Missouri law does not purport to prohibit or limit the ability of private companies to provide telecommunications services on a competitive basis. A number of Missouri municipalities, municipal organizations, and municipally owned utilities filed a petition with the FCC seeking an order declaring that the Missouri statute is preempted under Section 253(a).

The FCC denied the petition. Pet. App. 14a-45a. Relying on its own decision in the Texas case and the D.C. Circuit's subsequent affirmance in *City of Abilene*, the Commission noted that the case presented "a fundamental issue concerning the relationship between a state and its political subdivisions." *Id.* at 27a. The Commission accordingly again applied the *Gregory* plain statement rule. *Id.* at 19a. As in the Texas proceeding, the Commission was unable to conclude that either the use of the term "any entity" in Section 253(a) or the legislative history of Section 253(a) is sufficient to make clear Congress's intent to preempt the State's authority to control its political subdivisions. *Id.* at 29a-30a ("any entity"), 35a-37a (legislative history). Accordingly, the Commission concluded that "the term 'any entity' in section 253(a) of the Act was not

[1] The statute as originally enacted was scheduled to expire in August 2002. 1997 Mo. Legis. Serv. H.B. 620 (West). The Missouri General Assembly subsequently extended the statute's effectiveness until August 2007. 2002 Mo. Legis. Serv. H.B. 1402 (West).

intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 22a. The Commission generally extended that ruling to municipally owned utilities because it found no evidence "that municipally-owned utilities are not considered to be political subdivisions in Missouri." *Id.* at 32a-33a. The Commission noted, however, that "if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, [the Commission] could reach a different result under section 253(a)." *Id.* at 38a.

Although it held the Missouri statute not preempted, the Commission again urged, as a policy matter, "that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service," because "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a; see *id.* at 42a-43a (separate statement of Chairman William E. Kennard and Commissioner Gloria Tristani), 43a-44a (separate statement of Commissioner Susan Ness).

4. The Eighth Circuit reversed the FCC's determination that Section 253(a) does not preempt the Missouri statute. Pet. App. 1a-13a. The court of appeals, like the Commission, held that the plain statement rule of *Gregory* v. *Ashcroft* "applies in this case," and "requires [the court] to determine whether the statutory language plainly requires preemption." *Id.* at 6a, 7a. The court disagreed, however, with the Commission's application of that rule to the term "any entity" in Section 253(a).

The court held that "the words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule." Pet. App. 7a. The court noted that municipalities fall within the ordinary definition of the term "entity," *id.* at 8a (citing *Black's Law Dictionary* 553 (7th ed. 1999)), and asserted that the appearance of the modifier "any" "signifies [Congress's] intention to include within the statute all things that could be considered entities," *id.* at 8a-9a. For that proposition, the court relied principally on *Salinas* v. *United States*, 522 U.S. 52 (1997). In *Salinas*, this Court held that the federal bribery statute, which prohibits acceptance of bribes "in connection with any business transaction" by an agent of any organization that receives federal funds, does not require proof that the bribe had an effect on the federal funds. *Id.* at 56-57. In reaching that conclusion, the Court stated that "[t]he plain-statement requirement articulated in *Gregory* * * * does not warrant a departure from the statute's terms," because "[t]he text [of the federal bribery statute] is unambiguous on the point under consideration here." *Id.* at 60. In the Eighth Circuit's view, "*Salinas* held that by using the clearly expansive term 'any,' Congress expressed its intent to alter th[e] [federal-state] relationship." Pet. App. 12a.

Having concluded that Section 253(a) does operate to preempt state laws like the one in this case, the court of appeals vacated the FCC's decision and remanded the case to the agency for further proceedings. Pet. App. 13a.

SUMMARY OF ARGUMENT

A. It is common ground that 47 U.S.C. 253(a), which preempts state laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any

interstate or intrastate telecommunications service," applies to state laws that regulate entry by private firms into the telecommunications market. The question presented is whether it also preempts state laws that limit or prohibit the State's own political subdivisions from providing telecommunications service. The court of appeals in this case, as well as each of the other courts that has addressed that question, has concluded that it is governed by the clear statement rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). That conclusion is correct.

If Section 253(a) were construed to preempt state laws that allocate authority to political subdivisions, it would interfere with a fundamental aspect of state sovereignty. It is "[t]hrough the structure of its government" that "a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. A State's ability to structure its government, and to allocate—or not allocate—authority to its political subdivisions to perform whatever functions it deems appropriate, is therefore a fundamental feature of state sovereignty. Congress does not ordinarily intend to interfere with state authority in areas that are so central to state self-government. Accordingly, Section 253(a) cannot be construed to have that effect unless it can be concluded with certainty that Congress so intended.

B. In applying the *Gregory* rule, the crucial question is whether it can be concluded, from the terms, structure, or context of the federal law, not merely that Congress intended to achieve a general federal policy, but also that Congress considered the intrusive effect that application of the general federal policy would have on state sovereignty and intended that effect. No such conclusion can be drawn about Section 253(a).

Section 253(a) was intended to eliminate the old system of state regulation of the telecommunications marketplace by means of exclusive-franchise laws. Section 253(a) can therefore be given its intended effect by applying it to preempt state and local laws limiting the entry of private firms into that market. Nothing in the terms, structure, or context of Section 253(a) suggests that Congress intended to reach beyond preemption of such state and local regulatory authority. Accordingly, nothing in Section 253(a) suggests that Congress contemplated, or intended to authorize, an intrusion on the States' ability to structure their government—including their political subdivisions—as they desired.

This Court's cases support that conclusion. Those cases reveal that, where a federal statute is explicitly directed at state action that may have an effect on important sovereign functions, the *Gregory* rule is satisfied. By contrast, where Congress's intent to intrude into state sovereignty is unclear, the *Gregory* rule is not satisfied. This case falls within the latter class, because Section 253(a) was clearly directed at state regulatory authority over market entry by private firms, not the ability of a State to structure its own government and that of its political subdivisions.

C. The court of appeals recognized that the *Gregory* rule applies, but that court held that the *Gregory* rule is satisfied because Section 253(a) preempts state laws prohibiting "any entity" from providing telecommunication services. The term "any entity," however, does not provide the necessary assurance under *Gregory* that Congress considered and intended the intrusion on state sovereignty that would occur if Section 253(a) were construed to apply to a State's allocation of authority to its subdivisions.

Although this Court has noted in other cases that the term "any" in other statutes may have an expansive meaning, most of those cases did not involve a clear statement rule that governed the statutory interpretation. And none of those cases involved a federal statute that threatened the kind of serious inroad on an area central to state sovereignty that could be caused by applying Section 253(a) to limit a State's ability to decide on the proper allocation of authority to its political subdivisions. Indeed, in an analogous context to this case, the Court in *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002), found that the use of the term "any" was *not* sufficient to satisfy a clear-statement rule and require a broad interpretation of a federal statute. Similarly, the mere use of the phrase "any entity" in Section 253(a), a statute primarily directed toward state and local regulation of private firms, does not make clear that Congress considered or intended that the statute have effects that would intrude deeply on state sovereignty. Accordingly, under the *Gregory* rule, Section 253(a) may not be construed to have such effects.

ARGUMENT

MISSOURI'S STATUTE PRECLUDING THE STATE'S POLITICAL SUBDIVISIONS FROM OFFERING TELECOMMUNICATIONS SERVICE IS NOT PREEMPTED UNDER 47 U.S.C. 253(a)

A. Section 253(a) Does Not Preempt A State Law Allocating Authority To The State's Political Subdivisions Unless It Can Be Shown That Congress's Intent To Preempt Such Laws Is Clear Under The Rule Of *Gregory* v. *Ashcroft*

Under 47 U.S.C. 253(a), state laws that "prohibit or have the effect of prohibiting the ability of any entity to

provide any interstate or intrastate telecommunications service" are preempted. 47 U.S.C. 253(a). There is no dispute that Section 253(a) opens up competition in the provision of telecommunications service by preempting state laws that prohibit private firms from providing telecommunications service and thereby keep new entrants from participating in the telecommunications market. The question presented in this case is whether Section 253(a) should also be construed to preempt state laws that prohibit a State's political subdivisions from providing telecommunications service.

Each of the courts that has addressed the question whether Section 253(a) preempts state laws that prohibit political subdivisions from providing telecommunications service has concluded that that question is governed by the plain statement rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). The Eighth Circuit so concluded in this case. Pet. App. 6a ("A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states.") (citing *Gregory*). The D.C. Circuit reached the same conclusion in *City of Abilene*. See 164 F.3d at 52 ("§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*."). The other courts that have addressed the question have agreed.[2]

[2] See *City of Bristol* v. *Early*, 145 F. Supp. 2d 741, 747 (W.D. Va. 2001) (citing *Gregory* and noting that "[t]he question, then, is whether § 253(a) demonstrates a 'clear and manifest' intention by Congress to preempt state laws" that prohibit a municipality from providing a telecommunications service); *In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 371 (Neb.) (stating that "we are persuaded by the reasoning of the Eighth Circuit" in the instant case), cert. denied, 123 S. Ct. 2620 (2003); *Iowa Tel. Ass'n* v. *City of Hawarden*, 589 N.W.2d 245, 251-252 (Iowa 1999) (noting that *City of Abilene* had stated that "Congress's intent to include municipalities in the category of 'any entity' was not plain as required by *Gregory*" and stating that "[w]e agree with this interpretation of § 253(a)") (internal quotation marks omitted); *Municipal Elec. Auth.* v. *Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399, 403 (Ga. Ct. App. 1999) (citing *Gregory* and stating that "[w]ithout * * * a clear expression of congressional intent, the Federal Telecommunications Act does not preempt" a state administrative agency's order barring a municipal electric authority from providing telecommunications service).

The FCC likewise reached that conclusion. Pet. App. 19a, 26a-27a; see also *In re Public Util. Comm'n*, 13 F.C.C.R. at 3545-3546. Respondents have not disagreed with that conclusion or argued to the contrary. See Br. in Opp. 2; see also Resp. C.A. Br. 30 ("[a]ssuming" that *Gregory* applies and making no argument to the contrary).

That view is correct. *Gregory* involved the application of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, to a state constitutional provision setting a retirement age for appointed state judges. The Court recognized each "State's constitutional responsibility for the establishment and operation of its own government," 501 U.S. at 462, and explained that "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. A State's ability to define its governmental structure in that way is "of the most fundamental sort for a sovereign entity," and "Congressional interference with this decision of the people of [the State] * * * would upset the usual constitutional balance of federal and state powers." *Ibid.* Accordingly, "it is incumbent upon the federal courts to be certain of Congress' intent

before finding that federal law overrides this balance." *Ibid.* (internal quotation marks omitted). That clear statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

That plain statement rule is equally applicable here. A State's determination of which political subdivisions to create and what powers to allocate to them, like its determination of the qualifications of its judges, is a matter that goes to "the structure of its government." *Gregory*, 501 U.S. at 460. Political subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002), and the "number, nature and duration of the powers conferred upon [them] * * * rests in the absolute discretion of the State," *Sailors* v. *Board of Education*, 387 U.S. 105, 108 (1967). Accord *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-608 (1991); *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907) ("The state, therefore, at its pleasure, may modify or withdraw all such powers, * * * expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 629-630 (1819).

"Whether and how" a State uses its discretion in allocating powers to its political subdivisions therefore "is a question central to state self-government." *City of Columbus*, 536 U.S. at 437. As in *Gregory*, it "goes

beyond an area traditionally *regulated* by the States." *Gregory*, 501 U.S. at 460 (emphasis added); see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995). Instead, it is a part of the way in which "a State defines itself as a sovereign" and is "a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. Because Congress "does not readily interfere" with a State's fundamental determinations of how to organize and allocate its powers, courts should not lightly construe federal statutes to do so. *Id.* at 461. Rather, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" such fundamental state determinations. *Id.* at 460. The *Gregory* clear statement rule accordingly must be applied to determine whether Section 253(a) preempts a state law that denies the State's political subdivisions the authority to provide telecommunications service.

B. Section 253(a) Does Not Manifest A Clear Intent To Preempt State Laws Allocating Authority To Political Subdivisions Of A State

The role of the *Gregory* clear statement principle is to "assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). That does not mean that, when the question arises whether a federal law applies to a State in an area fundamental to its sovereignty, the federal law "must mention" the particular application "explicitly" in order to apply. *Gregory*, 501 U.S. at 467. It does mean, however, that the federal law should not be construed to apply unless it can be concluded, from the terms,

structure, or context of the federal law, that Congress intended not merely to achieve a general federal policy, but also to do so even at the cost of a possible effect on an area central to state self-government. As applied here, it cannot be concluded from the terms, structure, or context of Section 253(a) that Congress intended such an effect. Accordingly, Section 253(a) leaves to the States the structure of state government and the allocation of power among state political subdivisions.

1. Section 253(a) can be given its intended effect by construing it to preempt state and local regulatory actions that restrict entry by private firms into the telecommunications marketplace, while leaving unaffected the fundamental sovereign prerogative of the States to structure state government and allocate power to political subdivisions as they find appropriate. Prior to the 1996 Act, "local phone service was thought to be a natural monopoly," and States "typically granted an exclusive franchise in each local service area to a local exchange carrier." *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act, however, "rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets." *In re Public Util. Comm'n*, 13 F.C.C.R. 3460, 3461 (1997). Thus, a central goal of the 1996 Act as a whole was to stimulate "*private sector* deployment" of advanced telecommunications and information technologies and services. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

Section 253(a) was enacted to achieve that goal, by eliminating state and local laws that prohibited "any entity" from entering the telecommunications market

to compete with the incumbent local telephone company. In light of Congress's desire to eliminate the exclusive-franchise system, there was no reason to permit States to limit new entrants to those with a particular corporate form or structure or otherwise to impose unreasonable requirements on entrants into the marketplace. Cf. 47 U.S.C. 253(b) (preserving "competitively neutral" state laws that, *inter alia*, "protect the public safety and welfare"). Section 253(a) was accordingly worded broadly to accomplish the goal of ending "the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T*, 525 U.S. at 405 (Thomas, J., concurring in part and dissenting in part). Regardless of whether it extends to preempt state laws allocating or withdrawing power from political subdivisions, Section 253(a) serves its intended goal by preempting state and local regulations that preserve the old exclusive-franchise system or otherwise prohibit private firms from providing telecommunications service. See, *e.g.*, *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001) (Section 253 "prohibits state and local governments from creating 'barriers to entry,' legal requirements that prohibit or have the effect of prohibiting a company from providing telecommunications service."), cert. denied, 534 U.S. 1079 (2002); *RT Communications, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000) (upholding FCC determination that Section 253(a) preempts state law shielding rural incumbent telecommunications providers from competition by other private firms); *Cablevision of Boston, Inc.* v. *Public Improvement Comm'n*, 184 F.3d 88, 97-98 (1st Cir. 1999) (discussing purpose of Section 253(a)).

Congress's decision in Section 253(a) to open up the telecommunications market to new entrants, however,

did not require it to "in fact face[], and * * * bring into issue, the critical matters involved," *Raygor*, 534 U.S. at 544, in intruding upon a State's discretionary determinations of how to structure itself and its political subdivisions. There is no indication in the language or structure of Section 253(a) or elsewhere in the 1996 Act that Congress in fact intended to take the unusual step of interfering in a State's internal allocation of authority among itself and its political subdivisions. Accordingly, while Section 253(a) is appropriately construed to preempt a wide array of regulations that would limit the ability of competing firms to provide telecommunications service, the *Gregory* clear statement rule precludes an interpretation that would invalidate the traditional discretion enjoyed by States in allocating authority among their political subdivisions.[3]

---

[3] If it were concluded that Section 253(a) preempted state laws that limited the ability of their subdivisions to provide telecommunications service, the application of Section 253(a) would likely turn on matters of form that have nothing to do with Congress's purposes in the 1996 Act. Although there are wide variations in the ways in which States confer and limit the power of political subdivisions, an important distinction is between general-law and home-rule municipalities. As the Court has explained, "[i]n contrast to a general-law city, a home-rule city has authority to do whatever is not specifically prohibited by the State." *City of Lockhart* v. *United States*, 460 U.S. 125, 127 (1983). If the municipality is a general-law jurisdiction, then it would appear that the State could easily preclude a city from providing telecommunications service simply by not affirmatively providing it with authority to do so; a State's *refusal* to pass a law could not comfortably be construed as a "statute or regulation" or "requirement," and it therefore would not likely be subject to preemption under Section 253(a), even as construed by the court of appeals in this case. On the other hand, if the municipality were a home-rule jurisdiction, an affirmative act by the State could be necessary to preclude the city from providing telecommunications service, and preemption of such a law under Section 253(a) would be triggered under the court of appeals' interpretation of the statute. There is no reason to believe that Congress intended the application of Section 253(a) to turn on differences in the form a State has used in creating a particular political subdivision.

2. The conclusion that Section 253(a) does not manifest a clear intent to preempt state laws delineating the authority of political subdivisions is supported by this Court's other cases applying the *Gregory* rule. The Court has held that federal laws are sufficiently clear to satisfy *Gregory* in cases in which the federal law plainly indicates that Congress intended it to apply to the States even if such application would affect core sovereign concerns. On the other hand, the Court has held that the *Gregory* rule is not satisfied where it was not clear that Congress considered or intended the intrusions on state sovereignty that would follow from an expansive application of the federal law.

For example, *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), presented the question whether Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, which prohibits a "public entity" from discriminating against individuals with disabilities, applied to discrimination by state prisons against prisoners. The term "public entity" was defined to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* at 210 (quoting 42 U.S.C. 12131(1)(B)). The Court assumed that the *Gregory* rule controlled the question whether the ADA applied to state prisons and prisoners, but held that the statutory language satisfied that rule and therefore that the statute "unmistakably includes State prisons and prisoners within its coverage." *Id.* at 209.

Although Congress had not explicity mentioned state prisons or prisoners in the ADA, the terms of the ADA made clear that the statute was specifically intended to govern state governments in their relations to private parties. That made clear that Congress had considered and authorized whatever incursions on state sovereignty followed, and the *Gregory* principle was therefore satisfied.

Yeskey may usefully be contrasted with *Gregory* itself. In *Gregory*, the ADEA generally covered state employees, and it thereby demonstrated Congress's intent to that extent to regulate the qualifications of state employees. But the ADEA contained an exception excluding from its coverage an elected official, "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office," and an "appointee on the policymaking level." See *Gregory*, 501 U.S. at 465. As the Court explained, "[i]n the context of a statute that plainly excludes most important state public officials, 'appointee on the policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." *Id.* at 467. Although Congress in the ADEA had plainly intended to regulate the qualifications of state employees generally, it had also indicated that it did not want to regulate the qualifications of the top rank of state officials, whose qualifications were of most central importance to state sovereignty. Thus, examining the statute as a whole, the Court could not conclude that Congress had "in fact face[d], and * * * br[ought] into issue, the critical matters involved" in regulating the job qualifications of appointed state judges under the ADEA. *Raygor*, 534 U.S. at 544. Accordingly, the Court concluded that the ADEA did not apply to appointed state judges. *Gregory*, 501 U.S. at 467.

As in *Gregory*—but unlike in *Yeskey*—Section 253(a) does not provide any indication that Congress specifically considered and intended to authorize any special intrusion on state sovereignty. Accordingly, Section 253(a) should not be construed to have that effect. The Commission's interpretation of Section 253(a) should instead be upheld, because it avoids trenching upon a State's ability to delineate the scope of authority possessed by its subdivisions.

C. Congress's Use Of The Term "Any Entity" In Section 253(a) Does Not Show That It Intended The Statute To Regulate A State's Allocation Of Authority To Its Subdivisions

While recognizing that the *Gregory* rule applies, the court of appeals held that "the words 'any entity' [in Section 253(a)] plainly include municipalities and so satisfy the *Gregory* plain statement rule." Pet. App. 7a. That conclusion is incorrect. As argued above, the phrase "any entity" indicates only that Congress intended Section 253(a) generally to eliminate state exclusive-franchise and similar laws. That phrase does not indicate that Congress gave any attention to the intrusion on state sovereignty that would result from preemption of state laws concerning the proper allocation of authority to political subdivisions. Accordingly, the use of "any entity" in Section 253(a) does not plainly show that Congress intended to preempt state laws such as the one at issue in this case.

1. In holding that the phrase "any entity" is sufficient to constitute a plain statement by Congress that it intended to preempt state laws that allocate authority to its political subdivisions, the court of appeals placed principal weight on this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997). See Pet. App. 6a-7a, 10a-11a. That case, however, is inapposite.

In *Salinas*, the Court held that a federal bribery statute precluding the acceptance of a bribe "in connection with *any* business [or] transaction" of a government agency applies to bribes of local government officials that had no effect on federal funds. 522 U.S. at 57 (emphasis added). In reaching the conclusion that the scope of the bribery statute was sufficiently clear, *id.* at 59-60 (citing *Gregory*), the Court relied not simply on the term "any," but also on the other terms of the statute, see *ibid.*, and on the enactment of amendments to the statute that would have made a narrower construction "incongruous," *id.* at 58-59. In Section 253(a), however, Congress used the term "any" in an entirely different context, surrounded by entirely different statutory language and as the result of a different process of amendment than in *Salinas*. Conclusions about the breadth of the statute at issue in *Salinas* therefore are not applicable to the very different statute at issue here.

Moreover, the bribery statute in *Salinas* did not implicate the full scope of the *Gregory* rule. None of the proffered interpretations of the federal bribery statute at issue in *Salinas* would have placed any limits on a State's ability to control the structure of government for the people of the State—an issue that is "central to state self-government." *City of Columbus*, 536 U.S. at 437. By contrast, if Section 253(a) preempted state laws that prohibited a State's political subdivisions from providing telecommunications service, it would implicate a State's basic decisions about allocation of governmental power. See pp. 14-15, *supra*. Accordingly, the *Gregory* clear statement rule applies with full force in this case, unlike in *Salinas*.

2. The court of appeals' reliance on *Salinas* was further undermined by this Court's recent decision in

Raygor, which was not cited or discussed by the court of appeals. *Raygor* reinforces the conclusion that the use of a modifier such as "any" is not sufficient in itself to satisfy the *Gregory* plain statement standard. Like *Gregory* and this case, *Raygor* involved a matter that goes to the heart of state sovereignty—the power to limit claims brought against the State in the State's own courts. Specifically, *Raygor* concerned a federal statute, 28 U.S.C. 1367(d), that provides for the tolling of a state statute of limitations "for any claim" filed under a federal court's supplemental jurisdiction that ultimately is dismissed by the court. The question presented was whether the tolling provision applies when the federal court dismisses a claim on Eleventh Amendment grounds.

Applying *Gregory*, the Court in *Raygor* held that the statute's reference to "any claim" did not apply to claims against nonconsenting States that were dismissed on Eleventh Amendment grounds. 534 U.S. at 542-546. Although noting that the language of the federal statute, including the terms "any claim," did not clearly exclude tolling for such claims, the Court emphasized that "we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Id.* at 546 (citing *Gregory*, 501 U.S. at 467). *Raygor* thus contradicts the court of appeals' determination (Pet. App. 12a) "that * * * the clearly expansive term 'any'" in a statute implicating core state sovereignty interests is sufficient to demonstrate that Congress intended the statute to apply in areas going to the heart of state sovereignty. Cf. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985) (applying a clear statement rule to conclude that a statute providing remedies against "*any* recipient of Federal assistance" was insufficient to permit suit against a state

agency that received federal funds). Although the phrase "any entity" in Section 253(a) may not expressly *exclude* political subdivisions of a State, the inquiry under *Gregory* requires a showing that Congress specifically intended to *include* political subdivisions before the statute could be applied to them. There is nothing in Section 253(a) that could support such a showing.[4]

3. The other cases relied on by the court of appeals for the proposition that "the modifier 'any' prohibits a narrowing construction of a statute," Pet. App. 9a, also do not support its conclusion. It is true that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997). The term "any" therefore can be a useful guidepost in the ordinary process of statutory construction. See Pet. App. 9a-10a (citing cases). That fact, however, does not resolve the question in this case.

The premise of the *Gregory* rule is that "federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units." *City of Columbus*, 536 U.S. at 440. Accordingly, as the D.C.

[4] The term "entity," too, may "bear[] different meanings depending on the context." *Southern Co. Servs.*. v. *FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002). For example, the court in *Southern Services* concluded that provisions of the 1996 Act involving pole attachments used the term "entity" at times to include only entities that make attachments to the poles of others and at times to include both the pole owner and the attaching entity. *Ibid.* The use of that term in Section 253(a) accordingly cannot be taken to be a plain statement that Congress intended to include political subdivisions of a State—especially when the effect of such an inclusion would be to interfere with the State's determination of what powers it will confer upon its political subdivisions.

Circuit correctly recognized in *City of Abilene*, it is "not enough" to satisfy *Gregory* that Section 253(a) "could" apply to state laws allocating authority to the State's political subdivisions. 164 F.3d at 52-53. The plain statement rule requires something more to show "that in using the word 'entity,' Congress deliberated over the effect this would have on State-local government relationships," or that "it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *Id.* at 53. The mere use of the terms "any entity" in Section 253(a), a statute directed toward state and local regulation of private firms, does not make clear that Congress considered or intended that the statute have any such effect. Accordingly, the use of those terms in Section 253(a) is insufficient to satisfy the *Gregory* clear statement rule.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioner,

AND

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

AND

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether 47 U.S.C. § 253(a) establishes with the clarity required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that Congress intended to intrude on the States' authority to control their subordinate political subdivisions by preempting state laws that prevent those subdivisions from offering certain telecommunications services.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The Missouri Municipal League; the Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston Board of Utilities; Columbia Water & Light; and the American Public Power Association were petitioners both in the court of appeals and before the Federal Communications Commission ("FCC").

The FCC and the United States of America were respondents in the court of appeals.

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, and the State of Missouri were intervenors in the court of appeals and participated in the proceedings before the FCC.

The City of O'Fallon, Missouri; the City of St. Louis, Missouri; GTE Service Corporation (and its affiliated telecommunications companies), MCI Telecommunications Corporation; the National Telephone Cooperative Association; UTC, The Telecommunications Association; and Missouri River Energy Services participated in the proceedings before the FCC.

The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as *amici curiae* in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southwestern Bell Telephone, L.P., states the following:

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, is a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation. SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

No. 02-1238

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioner,

AND

No. 02-1386

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

AND

No. 02-1405

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER SOUTHWESTERN BELL TELEPHONE, L.P.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 299 F.3d 949. The order of the Federal Commu-

[1] Except where otherwise indicated, references to "Pet. App. __" are to the appendix to the certiorari petition filed by Southwestern Bell Telephone, L.P. in No. 02-1405.

nications Commission (Pet. App. 12a-39a) is reported at 16 FCC Rcd 1157.

JURISDICTION

The opinion of the court of appeals was entered on August 14, 2002. On November 20, 2002, petitions for rehearing and rehearing en banc were denied. Pet. App. 40a. On February 10, 2003, Justice Thomas granted both Southwestern Bell Telephone, L.P. and the Federal Communications Commission and United States an extension of time within which to file certiorari petitions to and including March 20, 2003. *E.g.*, *id.* at 41a. On February 18, 2003, the State of Missouri filed a timely petition for certiorari in No. 02-1238. On March 20, 2003, the federal government and Southwestern Bell filed their petitions in No. 02-1386 and No. 02-1405, respectively. On June 23, 2003, all three petitions were granted. 123 S. Ct. 2605, 2606, 2607. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 253(a), provides:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

All of section 253 is reproduced in the appendix to this brief, as are other relevant statutory provisions.

STATEMENT

1. The Federal Telecommunications Act of 1996. Before passage of the Telecommunications Act of 1996 ("1996 Act" or "Act"), local telephone service was generally thought to be a natural monopoly. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). States granted an exclusive franchise to a single carrier within a particular geographic area and regulated the exclusive franchisee, known as an

incumbent local exchange carrier ("ILEC"), as a public utility. *See id.* Among other things, States both required this single private carrier to provide "universal" service (that is, service at affordable rates to all who requested it) and closely supervised the exclusive franchisee's rates.

The 1996 Act transformed this exclusive-franchise model of local telecommunications by inducing other private competitors – long-distance companies such as AT&T and MCI, cable companies such as Comcast and Time Warner, and insurgent smaller competitors such as Birch and Cavalier – to deploy their own facilities and compete in the provision of local telecommunications. Noting that cable companies served 95% of American homes, Congress expressly concluded that "meaningful facilities-based competition is possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). Congress therefore set out a framework for introducing full facilities-based competition by "accelerat[ing] rapidly *private sector* deployment of advanced telecommunications and information technologies and services." *Id.* at 113 (emphasis added). In sum, as this Court has explained, "[t]echnological advances . . . have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies." *AT&T*, 525 U.S. at 371.

Section 253 codifies Congress's termination of the prior regime. Section 253(a) provides that no state or local law "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Sections 253(b) and (c) establish that, notwithstanding the general rule enunciated in subsection (a), Congress preserved significant state authority in the area of telecommunications. Section 253(b) thus provides that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [which addresses universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

telecommunications services, and safeguard the rights of consumers." Section 253(c) similarly preserves States' authority to regulate rights-of-way.

Section 253(d) gives the FCC authority, after "notice and an opportunity for public comment," to "preempt the enforcement" of state or local statutes that are contrary to section 253(a) or (b) "to the extent necessary" to correct the "violation or inconsistency."

2. The Missouri Statute. Beginning before Congress passed the 1996 Act, some Missouri municipalities proposed methods through which they could become competitive providers of telecommunications services. But, as regulators of private telecommunications companies, these cities exercised or proposed to exercise their control over access to public rights-of-way and other governmental powers as a means to attain an unfair competitive advantage over private telecommunications providers.

For example, a proposed telecommunications franchise code for the City of St. Peters would have required any user of a public right-of-way, in the course of any work installing, repairing, replacing, or upgrading its own telecommunications facilities, to "install and dedicate to the City either a state of the art telecommunications compatible conduit . . . or at least four optic fibers, at the City's option, . . . [to] be used by the City for whatever purposes it may deem appropriate, including rental to the Franchisee or other applicants."[2] The City would have had these free facilities available to compete directly with the carrier that installed them or indirectly by leasing the facilities to a competitor. A similar ordinance was proposed in Kansas City.[3]

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[2] City of St. Peters Proposed Ordinance, Telecommunications Franchise Regulatory Code, § 25.8-5(a)(5) (July 11, 1995) (Respondents' C.A. App. 174-76).

[3] "As part of the total compensation paid to the City for the right of an operator to occupy public property and conduct its business, the City shall require as part of a franchise or license agreement access to the system for transmission of video, audio, data or other signals. . . . The City may interconnect other systems, including its own, using appropriate technology that will not impair the operators' systems." Kansas City Draft Ordinance 960656, Chapter 25, Code of Ordinances – Communications Transmission Systems, § 25-71 (May 23, 1996) (Respondents' C.A. App. 178-79).

Additionally, in the City of Springfield, it took one carrier more than seven months to negotiate a pole attachment agreement with the City of Springfield's municipally owned utility ("City Utilities"), apparently because City Utilities was simultaneously demanding that the carrier lease excess fiber capacity from the city.[4] And, after City Utilities underbid Southwestern Bell for a fiber-optics project, the City of Springfield's own mayor accused City Utilities of using its control of public utility poles to learn details, including the prices, of Southwestern Bell's proposal.[5]

After conducting hearings and reviewing the history of such efforts by municipalities to gain unfair competitive advantages through abuse of their regulatory authority, the Missouri General Assembly enacted H.B. 620 in August 1997. With limited exceptions, that statute prevents political subdivisions of the State from offering or providing telecommunications services. The pertinent statutory provision establishes that "[n]o political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section." Mo. Rev. Stat. § 392.410(7) (2001). Under Missouri law, a certificate of authority is required to provide intrastate interexchange

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[4] *See* Deborah Barnes, *CU Restraining Trade, Firm Alleges*, Springfield News-Leader, Dec. 30, 1996, at 1B.

[5] Tamiya Kallaos & Ron Sylvester, *CU Abusing Power, Mayor Says*, Springfield News-Leader, Mar. 13, 1997, at 1A ("'[City Utilities] has been privy to all these negotiations,' [Mayor] Gannaway said. 'They knew every detail about it – what Bell was charging. All they had to do was undercut them on the price.'").

and local exchange telecommunications service. *See id.* § 392.410(2).[6]

3. The FCC Proceedings. In July 1998, the Missouri Municipal League as well as several other parties[7] (collectively, the "Missouri Municipals") filed a petition with the FCC asking that the Commission exercise its authority under section 253(d) to preempt H.B. 620. In particular, they requested that the FCC preempt that state statute to the extent that it prevented municipalities and municipally owned utilities from providing telecommunications services.

The FCC rejected those petitions and declined to preempt the Missouri statute. In reaching that conclusion, the FCC relied heavily on its prior determination in a case involving a legally indistinguishable question. In that earlier case, the FCC held that a Texas statute that prevented political subdivisions from providing telecommunications services was not preempted by section 253(a).[8] The FCC reasoned that

[6] As originally passed, this statute was set to expire in August 2002, but last year the Missouri Assembly extended it through August 2007. The Assembly also amended the relevant statutory provision to allow some sales of telecommunications services and facilities to telecommunications providers; the basic proscription on political subdivisions providing telecommunications services nonetheless remains. *See* Mo. Rev. Stat. § 392.410(7) (2002). Accordingly, that amendment does not alter the legal question posed here.

[7] The other parties were the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and City of Sikeston Board of Utilities.

[8] The Texas statute prevented a "municipality" from obtaining a certificate necessary to provide telecommunications service or from "'offer[ing] for sale to the public, either directly or indirectly, . . . a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.'" Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3540-41, ¶ 173 (1997) ("*Texas Preemption Order*") (quoting Texas Pub. Util. Reg. Act of 1995 § 3.251(d), Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (West Supp. 1996)).

section 253(a) could preempt such state laws only if it spoke with the clarity required by the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* applied because Texas's determination of what powers to delegate to its political subdivisions was a "fundamental state decision[]" with which "'Congress does not readily interfere,' absent a clear indication of intent." *Texas Preemption Order*, 13 FCC Rcd at 3545-46, ¶ 181 (quoting *Gregory*, 501 U.S. at 461). In concluding that the *Gregory* plain-statement rule had to be satisfied, the FCC's *Texas Preemption Order* expressly followed the long series of cases from this Court establishing that political subdivisions are "creatures . . . of the state" and "'subordinate governmental instrumentalities'" whose powers "'rest[] in the absolute discretion of the State.'" *Id.* at 3545, ¶¶ 180, 181 (citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984), and quoting *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967)) (ellipsis in original; internal quotation marks omitted).

The FCC found no plain statement that would satisfy the *Gregory* rule. The FCC concluded that section 253(a) "appears to prohibit restrictions on market entry that apply to independent entities *subject to state regulation*, not to political subdivisions of the state itself." *Id.* at 3547, ¶ 184 (emphasis added). The FCC further explained that a contrary result would have extreme and anomalous consequences: "If we were to construe the term 'entity' in this context to include municipalities, which . . . are mere 'instrumentalities' of the state, section 253 effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects." *Id.* Put differently, "preempting the enforcement of [the Texas statute] would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Id.* at 3544, ¶ 179.

On review of the *Texas Preemption Order*, a unanimous panel of the D.C. Circuit (Randolph, J., joined by Rogers and Tatel, JJ.) affirmed the FCC's judgment. *See City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). Like the FCC, the D.C. Circuit determined that the *Gregory* plain-statement rule applied. *See id.* at 52. And, again like the FCC, the court concluded that the *Gregory* rule was not satisfied because section 253(a) did not speak with the "unmistakable clarity" necessary to conclude that Congress intended to "alter[] the State's governmental structure." *Id.* The Court explained that Congress left the term "entity" "undefined in the Telecommunications Act." *Id.* In the absence of such a definition, it was "linguistically possible" that a political subdivision could be considered an "entity" covered by section 253(a), but that result was not compelled by the text. *See id.* at 52-53. In sum, there was no "textual evidence" demonstrating that "Congress deliberated over the effect" this intrusion on state sovereignty "would have on State-local government relationships" and that, despite that consequence, Congress "meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *Id.* at 53.

In the decision at issue here, the FCC found the *Texas Preemption Order* and its affirmance in *City of Abilene* to be controlling. The FCC concluded that it was "presented . . . with the same issue that [it] addressed in the *Texas Preemption Order*." Pet. App. 23a (¶ 12). Accordingly, as it had in its prior order, the FCC determined that section 253(a) did not clearly establish Congress's intent to deprive States of the right to control subordinate state governmental bodies. In reaching that result, the FCC noted the D.C. Circuit's conclusion that the language of section 253(a) is "not clear enough to demonstrate, pursuant to *Gregory*, that Congress intended to intrude upon state-local government relationships." *Id.* at 24a (¶ 14). In accord with that holding and its own prior determination, the FCC again held that "the term 'any entity' in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit

restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 19a (¶ 9).

Three FCC commissioners filed statements agreeing that the correct legal result was that the Missouri statute had not been preempted, but voicing the opinion that, as a policy matter, the competitive issues raised by municipal provision of telecommunications should be dealt with in other ways. *See id.* at 36a-37a, 38a-39a.

4. The Eighth Circuit Proceedings. The Missouri Municipals filed a petition for review of the FCC's judgment in the Eighth Circuit, which was the only court of appeals other than the D.C. Circuit with venue over their petition. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2343 (establishing jurisdiction to review FCC orders in the D.C. Circuit as well as in the circuit in which the petitioner resides).

In granting the petition for review, the Eighth Circuit expressly disagreed with the D.C. Circuit's conclusion in *City of Abilene* and vacated the order of the FCC. In parting ways with the D.C. Circuit, however, the Eighth Circuit did *not* dispute that the *Gregory* plain-statement rule applied. *See* Pet. App. 5a-6a. Instead, unlike both the FCC and the D.C. Circuit, the Eighth Circuit found that section 253(a) satisfied the *Gregory* standard. In analyzing the word "entity," the Eighth Circuit cited a 1999 edition of a legal dictionary to demonstrate that "[t]here is no doubt" that the "'ordinary meaning'" of that word includes "municipalities." *Id.* at 7a. The Eighth Circuit further found Congress's use of the word "any" to be particularly important evidence that Congress intended to preempt state laws limiting political subdivisions' ability to provide telecommunications services. *See id.* ("Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities."). In this regard, the Eighth Circuit highlighted this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997), where the Court found that the phrase "any business, transaction, or series of transactions" in the federal bribery statute is sufficiently clear to cover bribery of

state officials holding a federal prisoner. *See* Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

This is a straightforward case. Under *Gregory v. Ashcroft* and its progeny, section 253(a) can be interpreted to strip the States of the right to decide whether their political subdivisions offer telecommunications only if the Court were to determine that section 253(a) is unmistakably clear in compelling that interpretation. That standard is not remotely satisfied. Section 253(a) is at best ambiguous as to whether Congress intended the extreme result of freeing political subdivisions of the constraints placed upon them by state law. Accordingly, the judgment of the Eighth Circuit should be reversed.

A. The *Gregory* plain-statement rule applies to this case. Under the Court's precedents, including its recent decision in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), a State's ability to control the actions of its political subdivisions is central to state self-government. Respondents' reading of section 253(a) would deny States an aspect of that core attribute of their sovereignty. It thus implicates *Gregory*, as the FCC, the D.C. Circuit, and even the Eighth Circuit have properly concluded.

B. Section 253(a) does not speak with the clarity required to clear the *Gregory* hurdle. Congress passed the 1996 Act, and section 253(a) in particular, to overturn state exclusive-franchise laws and thus to free private competitors potentially subject to state regulation from the state and local laws that would otherwise preclude their entry into local telecommunications markets. That step itself transformed traditional local telecommunications regulation. However, section 253(a) does not demonstrate – much less demonstrate unmistakably – that Congress went much further and forced the States to allow their own instrumentalities to offer telecommunications services even if the State has decided against that course as a matter of policy.

The text of the statute supports that conclusion for multiple reasons. As an initial matter, because section 253(a) bars

"State *or* local" statutes and regulations that prohibit "any entity" from offering telecommunications services, if the statute were read as respondents suggest, that would mean that a local legislative body (such as a town council) itself could not bar local executive officials from offering telecommunications. Moreover, if the 1996 Act were read this way, that would mean that, as a matter of federal law, States could abolish municipalities entirely, but lack the much lesser power to prevent them from offering telecommunications. Those are absurd results that Congress could not have intended. Additionally, the statutory context – particularly, sections 253(b) and (c) – suggests that Congress intended to *preserve*, not negate, important state public policies. As the D.C. Circuit properly understood, it would be extremely odd for Congress to "set aside [such] a large regulatory territory for State authority" in subsections (b) and (c) yet override the States' core authority to control their political subdivisions in subsection (a). *City of Abilene*, 164 F.3d at 53. Congress would need to speak with much greater clarity than it has if it desired to mandate that bizarre dichotomy.

The use of the term "entity" similarly fails to demonstrate that Congress plainly intended to force States to permit their political subdivisions to offer telecommunications. The word "entity" normally connotes a thing with "a distinct and independent existence" – a criterion that is not met by political subdivisions that are wholly *dependent* on the State for their continued existence and their ability to exercise powers of any kind. Even more to the point, precisely because the exact contours of the word "entity" and its application to public bodies are unclear, Congress frequently defines that word, and it has done so in ways that both include *and* exclude public instrumentalities. Congress provided no such definition here. Moreover, the United States Code refers at least 600 times to forms of the phrases "public entity" and "government entity," demonstrating yet again that Congress well knows how to include such bodies within a statute's ambit. Again, Congress did no such thing here.

The use of the word "any" to modify "entity" does not override all these other indications that Congress did not plainly intend to reach the result that respondents urge. As this Court explained in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), a closely analogous *Gregory* case involving the phrase "any claim," this is at most "general language" that does not demonstrate the requisite "specific or unequivocal intent" to preempt the States' historic prerogative to control the actions of their subdivisions. *Id.* at 544-45.

In the end, as respondents themselves have acknowledged, this case turns on whether section 253(a) should be "interpreted *broadly*." Cert. Opp. i (question presented) (emphasis added). Under *Gregory*, however, if a federal statute is subject to a "broad" and a "narrow" construction, it must be read narrowly so as to avoid intruding on traditional state prerogatives. Thus, even assuming that respondents' construction of section 253(a) were a plausible one, it is not mandated with the clarity required by this Court's precedents, and should thus be rejected.

ARGUMENT

SECTION 253(a) DOES NOT PREEMPT STATES' DEEPLY ROOTED AUTHORITY TO LIMIT THE ACTIVITIES OF POLITICAL SUBDIVISIONS

A. Section 253(a) May Be Interpreted To Prevent States from Controlling the Actions of Political Subdivisions Only if Unmistakably Clear Language in the Statute Itself Compels that Conclusion

Under this Court's precedents, respondents bear a heavy burden in arguing that Congress has intervened in the relationship between the State of Missouri and its political subdivisions and barred the State from controlling the activities of those political subdivisions.

1. Even assuming that Congress has the *power* to overturn state laws limiting the authority of political subdivisions to provide telecommunications, Congress should not be "lightly" assumed to have done so. *See Gregory v. Ashcroft*,

501 U.S. 452, 460 (1991). Rather, if Congress intends to alter the constitutional balance between the States and the federal government, it must make its intention to do so "'*unmistakably clear in the language of the statute.*'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (emphasis added); *Gregory*, 501 U.S. at 460; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The relevant rule is that, where Congress "legislates in 'traditionally sensitive areas' that 'affect the federal balance,'" it must provide a "clear statement" demonstrating that intent in the text of the statute. *Raygor*, 534 U.S. at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting in turn *United States v. Bass*, 404 U.S. 336, 349 (1971))) (internal quotation marks and alteration omitted).

This established interpretive principle is grounded in the bedrock values of our constitutional system. The federal structure of our government "preserves to the people numerous advantages" – including decentralized government responsive to the needs of diverse communities, increased opportunity for innovation and experimentation, and a check on abuses of government power. *Gregory*, 501 U.S. at 458-59. Thus, although the Supremacy Clause generally empowers the national government to alter the "delicate balance" between federal and state authority, *id.* at 460, the Court proceeds from the premise that Congress interferes with the "substantial sovereign powers" retained by the States only after giving the matter careful consideration and squarely addressing this sensitive issue in the text of the statute, *id.* at 461.

2. There can be no serious dispute that this requirement of unmistakably clear language applies in this context.

States traditionally maintain unlimited authority in determining the "number, nature and duration" of the powers conferred on their political subdivisions. *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967) (internal quotation marks omitted). As the Court has explained, "[t]he principle is well settled that local governmental units are created as conven-

ient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (internal quotation marks and alterations omitted); *see Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States enjoy "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them").[9] As Justice Frankfurter explained, "[i]t would make the deepest inroads upon our federal system for [a federal court] now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States." *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in the result); *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-30 (1819) (in delineating the powers of its political subdivisions, a State is "unrestrained by any limitation of its power imposed by the constitution of the United States").

The Court reiterated this key point just last year in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002). In that case, the Court held that the Interstate Commerce Act did not preempt a State's authority to delegate to political subdivisions the power to regulate the safety of certain motor carriers. *See id.* at 435-38. In concluding that Congress did not intend to interfere with such decisions by the State, the Court once again stressed the "essential observation" that "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the State's] absolute discretion.'" *Id.* at 437 (quoting *Mortier*, *supra*). "Whether and how to use that discretion is a question central to state self-government." *Id.*

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[9] Missouri law accords with this Court's understanding of the relationship between a State and its political subdivisions. *See Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. 1985) (under Missouri law, "[a] municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly and impliedly granted it by the state").

Under *City of Columbus* and the decisions on which it is based, interpreting section 253(a) in the manner suggested by the Missouri Municipals would strike at the heart of the sovereignty of the States. *See Gregory*, 501 U.S. at 460. Accordingly, the Court's precedents establish that this is precisely the kind of case to which the *Gregory* rule most properly applies.

Because the issue is so clear, there has in fact been wide agreement on the applicability of *Gregory* to the issue presented here. Both the Eighth Circuit and the D.C. Circuit expressly concluded that *Gregory* applies. *See* Pet. App. 6a ("[T]he *Gregory* rule requires us to determine whether the statutory language plainly requires preemption."); *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (concluding that, because the relationship between a State and its subdivisions "strikes near the heart of State sovereignty," "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory*"). The FCC has likewise determined that *Gregory* applies to the issue presented here. *See Texas Preemption Order*, 13 FCC Rcd at 3545, ¶ 181. And even the Missouri Municipals did not dispute in the Eighth Circuit that, for the Missouri statute to be preempted, section 253(a) would have to satisfy the *Gregory* standard. *See* Missouri Municipals C.A. Opening Br. at 30 (8th Cir. filed Mar. 26, 2001).[10]

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[10] Although the Court need go no further than *Gregory* to determine the proper rule of statutory construction here, the extreme result championed by respondents also implicates a second plain-statement rule: the rule that a statute should not be read to create a significant constitutional issue unless that result was Congress's clear intent. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

If section 253(a) is read as the Missouri Municipals claim, then the federal government has effectively conscripted the governments of the States into assisting with Congress's plan to inject competition into local telecommunications markets. Such an interpretation implicates the Tenth Amendment principle that Congress may not "commandeer" the governments of the several States to act as instruments of congressional will. *See New York v. United States*, 505 U.S. 144, 161 (1992) (internal quota-

B. Section 253(a) Does Not Establish with Unmistakable Clarity Congress's Intent To Preempt States' Authority over Their Political Subdivisions

Section 253(a) does not demonstrate with anything approaching a plain statement that Congress intended to preempt the States' long-established authority to control the actions of their subdivisions.

1. Before 1996, many state and local laws banned competition of any kind in all or part of local telecommunications markets.[11] As a matter of law, private companies that might want to compete could not do so, no matter how efficient they might be or what benefits they might bring to consumers. Regulators treated the local telecommunications market as a "natural monopoly" and granted "exclusive franchise[s] in each local service area," thus outlawing competition. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

A core purpose of the 1996 Act was, in this Court's words, to "end[] the longstanding regime of state-sanctioned monopolies." *Id.* Congress recognized that cable companies had facilities covering 95% of American homes and that they and other new competitors – including wireless providers, long-distance companies, and fledgling wireline companies –

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tion marks omitted); *Printz v. United States*, 521 U.S. 898, 928 (1997). If States cannot stop local governments from entering the telecommunications business, then the 1996 Act serves to compel States to further the federal regulatory plan. *See Printz*, 521 U.S. at 928 (Congress may not require officials of States and state subdivisions to take actions to enforce federal regime); *Atascadero*, 473 U.S. at 238 n.2 ("The Constitution never would have been ratified if the States . . . were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.").

[11] *See* NARUC, *Telecommunications Competition 1997: A State-By-State Report On Pro-Competitive Measures In Intrastate Telecommunications*, at Table 1 (Sept. 1997); Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 14171, 14174, ¶ 5 (1996) ("[A]s of 1996, more than 30 states had not adopted laws or regulations providing for local competition. Many of those states that had not adopted laws or regulations permitting local competition had provisions that specifically limited competitive entry into local telecommunications markets.").

could make "meaningful facilities-based competition . . . possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). Congress accordingly decided to override state laws that banned such companies from entering these markets. In so doing, it opened the door for "accelerate[d] . . . *private sector* deployment of advanced telecommunications and information technologies and services." *Id.* at 113 (Joint Explanatory Statement of the Committee of Conference) (emphasis added).

Section 253(a) makes possible this transformation of local telecommunications markets from state-sanctioned monopoly to private competition. By expressly preempting "State or local statute[s] or regulation[s], or other State or local legal requirement[s]," that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," Congress ensured that States and localities could not enforce exclusive franchise laws or other requirements that effectively precluded entry by cable companies, long-distance companies, and other private parties that would normally be subject to state and local regulation.

Thus, what is clear from section 253(a) is that it precludes state laws that insulate incumbent local telecommunications providers from competition from the other kinds of private providers that Congress believed could now technologically compete with the incumbents. What is *not* clear from section 253(a) – and, in fact, seems quite unlikely – is that Congress intended to go well beyond that and required States to permit their political subdivisions to offer telecommunications service even if States had determined that to be bad public policy.

At bottom, it is the statutory text that demonstrates that Congress did not clearly intend to overturn the latter class of state laws. Before parsing that text in detail, however, it is worth noting that mandating that States permit their subdivisions to provide telecommunications services would have involved distinct – and thorny – questions not only of federalism, but also of telecommunications policy. As the FCC

has explained, "municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor." Pet. App. 22a (¶ 11). Among many other potential issues, local governments may use their control over rights-of-way to obtain unfair competitive advantages by, for instance, demanding in-kind benefits in exchange for use of rights-of-way. *See, e.g., supra* pp. 4-5. They may also obtain unfair advantages by subsidizing their commercial ventures with revenues from other sources and may use their regulatory authority to disadvantage potential competitors. *See generally* Brief of USTA/Verizon as *Amicus Curiae* in Support of Cert. at 7-13, Nos. 02-1238 *et al.* (discussing policy issues raised by municipal entry); Nebraska Cable Communications Ass'n Brief *Amicus Curiae* in Support of Cert. at 3-7, Nos. 02-1238 *et al.* (elaborating upon access discrimination and cross-subsidization problems raised by municipal entry into telecommunications).

Moreover, when Congress passed the 1996 Act, it had little reason to tackle those distinct and difficult policy issues. At that time, there were very few municipalities offering telecommunications services. *See* John M. Eger & Arthur M. Becker, *Telecommunications and Municipal Utilities: Cooperation and Competition in the New Economy* at 18, Special Report Prepared for the American Public Power Association (Sept. 2000) (as of 1997, 65 municipal utilities in the entire country offered some form of telecommunications service). This was, accordingly, not a significant issue upon which Congress was required to focus its deliberations or to provide a single one-size-fits-all solution that would short-circuit state experimentation. It would be particularly strange for Congress to reach out and preempt state policy determinations on an issue that, at the time, was not of significant national concern.

2. Consistent with that context, the text of section 253 does not show unequivocally that Congress deliberated about the distinct issues raised by government provision of tele-

communications services and decided to alter the federal-state balance by overriding state laws that banned that practice.

As an initial matter, Congress's statement that it was preempting "State or local statute[s] or regulation[s], or other State or local legal requirement[s]," that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," is most naturally read to lift state and local restrictions on companies that would otherwise be subject to state regulation, not to excuse the regulators themselves – the State and its subdivisions – from applicable state law. As the FCC put the point, section 253(a) "appears to prohibit restrictions on market entry that apply to independent entities *subject to state regulation*, not to political subdivisions of the state itself." *Texas Preemption Order*, 13 FCC Rcd at 3547, ¶ 184.

Indeed, if section 253(a) were read as the Missouri Municipals claim, that would lead to absurd results that Congress could not have intended. Under that interpretation, as a matter of federal law the State of Missouri would indisputably possess absolute discretion to abolish municipalities entirely, *see, e.g., Mortier*, 501 U.S. at 607-08, but it would be barred from taking the much lesser step of preventing them from providing telecommunications services. It is difficult to imagine that Congress intended such a result.

Equally significant, because section 253(a) preempts "State" or "local" regulations, it not only would prevent a *State* from controlling its subdivisions in this one discrete area, but also would prevent a *town council* from determining that it was not in the town's interest to offer telecommunications services. So, if the mayor of a town wanted to offer such services despite a contrary ordinance passed by the council, the mayor could claim that, because of section 253(a), he was not bound by the council's determination. Even aside from the *Gregory* canon, the Court should not adopt such an absurd reading of the statute unless it were extraordinarily clear that this was Congress's intent. *See, e.g.,*

United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994).

Moreover, as with all statutory provisions, the language of section 253(a) must be read in context. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (when interpreting statutes, the Court does not focus on "a single sentence or member of a sentence" but on "the provisions of the whole law, and . . . its object and policy") (internal quotation marks omitted); *Jones v. United States*, 527 U.S. 373, 389 (1999). Here, the key statutory context is provided by the subsequent subsections, through which Congress expressly preserved States' authority under state law to pursue important policies of local concern, including universal service and consumer protection, even if those policies might be inconsistent with section 253(a). *See, e.g.*, 47 U.S.C. § 253(b) ("Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, . . . and safeguard the rights of consumers."). As the D.C. Circuit explained, these two provisions "set aside a large regulatory territory for State authority." *City of Abilene*, 164 F.3d at 53. And, as that Court understood, *see id.*, it would be quite peculiar for Congress to be so expressly solicitous of these state-law policies in sections 253(b) and (c), yet at the same time preempt a state judgment that the State itself and its instrumentalities should not enter the telecommunications marketplace. At the least, if Congress did intend to create such a dichotomy, one would expect – and *Gregory* requires – significantly more clarity on this point in the text of section 253(a).[12]

[12] In the proceedings below, respondents argued that the "plain statement" requirement could be found in the legislative history of section 253(a). That assertion is without foundation. *Gregory* requires a "plain statement" in the text itself – "it must be plain to anyone *reading the Act* that it covers judges." 501 U.S. at 467 (emphasis added). The Court has said the same thing in the analogous Eleventh Amendment context. *See Atascadero*, 473 U.S. at 242 (Congress may abrogate state immunity

Congress's use of the word "entity" – even viewed outside of this statutory context – also demonstrates that section 253(a) is at best ambiguous on this point. An "entity" is defined as "a thing with distinct and independent existence,"[13] "[s]omething that exists as a particular and discrete unit,"[14] or "[s]omething that exists independently."[15] As the D.C. Circuit has explained, an "entity" may "include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, [or] an association." *City of Abilene*, 164 F.3d at 52. Accordingly, consistent with the FCC's analysis, the term "entity" as used in section 253(a) plainly would encompass all forms of private enterprise that might be regulated by the State.

By contrast, and as noted earlier, settled law establishes that political subdivisions are not "distinct" and "independent" from the State; to the contrary, they are part of the State and dependent upon it for any powers they may be authorized to wield. They are thus not *clearly* encompassed within the "entities" covered by section 253(a). *See also Sailors*, 387 U.S. at 107 ("Political subdivisions of States – counties, cities or whatever – never were and never have been considered as sovereign entities.") (internal quotation marks omitted); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding the word "entity" to be ambiguous in 47 U.S.C. § 224; "[t]he most that can be said is that § 224(e)(2) is unclear on whether utilities or municipalities count as 'attaching entities'"); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding the word "entity" to be ambiguous in 47 U.S.C § 275(a)(2)). This does not mean that it is not "linguistically possible," *City of Abilene*, 164 F.3d at 52, that Congress intended the term "entity" to cover political subdivisions, but the disposi-

"only by making its intention unmistakably clear in the language of the statute").

[13] *New Oxford American Dictionary* 568 (2001).

[14] *Webster's II New College Dictionary* 376 (1999).

[15] *The Concise American Heritage Dictionary* 236 (rev. ed. 1987).

tive point is that Congress's use of that word hardly provides the necessary unequivocal evidence that Congress affirmatively intended to preempt state control over political subdivisions.

That conclusion is fortified significantly by the fact that Congress plainly understands that the term "entity" is ambiguous standing alone. Congress thus frequently defines that term – which it did *not* do in section 253 – and has done so in ways that both include *and* exclude political subdivisions. *Compare, e.g.*, 2 U.S.C. § 1602(14) ("The term 'person or entity' means any individual, corporation, company, foundation, . . . or State or local government.") *and* 42 U.S.C. § 285a-9(a)(4) ("the term 'entity' means any . . . agency of any State or local government") *with* 21 U.S.C. § 1907(1) ("The term 'entity' means a partnership, joint venture, association, corporation, organization, network, group, or subgroup, or any form of business collaboration.") *and* 26 U.S.C. § 269B(c)(1) ("The term 'entity' means any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity.").[16]

Nor is that the only way that Congress has elsewhere addressed the lack of unmistakable clarity in the application of the word "entity" to governmental bodies. On more than *600* other occasions in the United States Code, Congress has used forms of the phrase "government entity" or "public entity" to encompass governmental actors.[17] Congress could easily

[16] *See also* 26 U.S.C. § 302(c)(2)(C)(ii)(I) ("the term 'entity' means a partnership, estate, trust, or corporation"); 47 U.S.C. § 274(i)(6) ("The term 'entity' means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.").

[17] *E.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (Americans with Disabilities Act of 1990 is not ambiguous as to term "public entity," which includes state prisons); 15 U.S.C. § 3802(c) ("the term 'public entities' means any unit or units of State and/or local governments"); 15 U.S.C. § 6602(3) ("[t]he term 'government entity' means an agency, instrumentality, or other entity of Federal, State, or local government"); 42 U.S.C. § 290ff(a)(2) ("the term 'public entity' means any State, any political subdivision of a State, and any Indian tribe or tribal organization"). If one runs the following search in Westlaw's USC database, 656 separate documents are retrieved: (government! w/2 entity or entities) or (public! w/2 entity or entities).

have included a similar clarification here as well if it had intended to resolve the issue whether States could prevent their subdivisions from offering telecommunications services.

Furthermore, elsewhere in the Communications Act of 1934 itself, Congress defined the term "noncommercial telecommunications entity" to include bodies that, among other things, are "owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation, or association." 47 U.S.C. § 397(7). Similarly, Congress uses variants of the phrase "local government" throughout the Communications Act[18] and could easily have specified that "entities" included "local governments" if it had intended to resolve the question at issue here.

In sum, Congress well understands that the term "entity" is ambiguous as to its application to public bodies, and, in other instances where it seeks to include such bodies within the meaning of the term, has either included a specific definition or used a more precise phrase. The fact that Congress did not do so here provides further evidence that section 253(a) is not unmistakably clear in compelling the result urged by respondents. *See, e.g., Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (comparison of federal statute showing that Congress "knows exactly how" to provide an innocent-owner defense reinforces the conclusion that no such defense exists in another statute that does not contain the similarly express language); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (Congress "demonstrated in [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980] that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under [the

[18] *See* 47 U.S.C. §§ 158(d)(1), 221(b), 223(f)(2), 302a(f), 305 note (2-411), 309(j)(2)(A), 332(c)(3)(A), 332(c)(7)(A)-(B), 337(f)(1)(B)(i), 392(a)(1), 394(i)(2), 396(k)(2)(A), 543(a)(1), 902(b)(2)(N), 922(2).

Resource Conservation and Recovery Act of 1976] does not provide that remedy"); *McFarland v. Scott*, 512 U.S. 849, 861-62 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Congress knows how to give courts the broad authority to stay proceedings of the sort urged by petitioner. . . . The absence of such explicit authority in the habeas statute is evidence that Congress did not intend federal courts to enter stays of execution in the absence of some showing on the merits.").

3. The Eighth Circuit did not come to grips with those key facts in concluding that the "ordinary meaning" of "entity" clearly encompassed political subdivisions. *See* Pet. App. 7a (internal quotation marks omitted). Instead, as evidence for that point, it cited a definition given in a 1999 edition of one legal dictionary (*Black's Law Dictionary*). *See id.* That evidence hardly establishes that the word "entity" conveys an unmistakable intent to preempt state laws governing the activities of political subdivisions. As noted, the question before the Court is not whether "entity" could conceivably bear the meaning the Eighth Circuit ascribed to it; rather, it is whether the statute *necessarily* has that meaning. *Gregory*, 501 U.S. at 464 ("[W]e must be absolutely certain that Congress intended such an exercise. To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [we have] relied to protect states' interests.") (internal quotation marks and citation omitted). Given that Congress specifically defines "entity" to include public bodies when that is its intent, the absurd consequences that would result from the conclusion championed by respondents, the statutory context, and the other possible definitions of the term, the fact that one dictionary indicates that "entity" can include political subdivisions hardly creates the unmistakable clarity that would be necessary to affirm the Eighth Circuit.

Nor is it an answer to these other arguments to claim, as the Eighth Circuit did, that Congress chose to modify "entity" with "any" in section 253(a). *See* Pet. App. 7a-9a. On the contrary, this Court's case law compels the conclusion

that, without more specific evidence of the kind lacking in section 253(a), the word "any" by itself does not demonstrate sufficiently clearly that Congress deliberated about and intended to resolve the kind of core federalism issues involved in this case.

In particular, the Court's recent decision in *Raygor* is dispositive on this point. *Raygor* involved the scope of 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations period "for *any* claim" (emphasis added) that is ultimately dismissed by a federal court that had been filed under the court's supplemental jurisdiction. The question was whether section 1367(d) applied even where the claim was dismissed on Eleventh Amendment grounds. After holding that the *Gregory* rule applied to that interpretive issue, the Court concluded that the statute's general reference to "*any* claim" was insufficient to constitute a plain statement under *Gregory*. It explained:

> [W]e have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of Federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. Instead, we held that "when Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Likewise, § 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . .

534 U.S. at 544-45 (quoting *Atascadero*, 473 U.S. at 245-46) (citations and internal brackets omitted). Thus, the Court reasoned, "although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of

what it *excludes*." *Id.* at 546. On that basis, the Court concluded that the plain-statement rule was not satisfied. *See id.*

The same analysis applies here, and it undermines the Eighth Circuit's reliance on the modifier "any" to demonstrate unmistakable clarity. Even aside from the other contextual evidence discussed above, in this case, as in *Raygor*, the phrase "any entity" is at most "general language" that does not demonstrate a "specific or unequivocal intent" to address the issue presented here. Under such circumstances, *Raygor* teaches that the *Gregory* standard has not been satisfied.

Contrary to the Eighth Circuit's analysis, the Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997), does not undermine any of these points – in fact, it strongly reinforces the conclusion reached by the FCC and the D.C. Circuit. That case involved the federal bribery statute, which refers to "any business, transaction, or series of transactions." *See id.* at 56. The question presented was whether that language encompasses the receipt of a bribe by a local official in exchange for allowing improper visits to a federal prisoner, a payment that did not affect federal funds. The Court concluded that the statute is sufficiently broad to reach that conduct and that it would "press statutory construction to the point of disingenuous evasion" to reach any other conclusion. *Id.* at 60 (internal quotation marks omitted).

Crucially, however, the Court did not rely solely on the fact that the statute used the word "any" in analyzing the relevant statute. Instead, as in *Raygor*, it looked at the statute as a whole, as well as its history, to determine that the language at issue was sufficiently "unambiguous" in covering the transaction at issue. For instance, the Court stressed that related language in the statute referred broadly to covering all "'organization[s], government[s], or agenc[ies]'" receiving funds under the federal program. *Id.* at 57. The Court further noted that, prior to the enactment of the statute at issue in *Salinas*, federal courts had split on whether federal bribery law could be interpreted to apply to "state and local employees." *Id.* at 58. Congress thus enacted that law precisely to

resolve this issue. *See id.* at 59 ("Acceptance of Salinas' suggestion . . . would run contrary to the statutory expansion that redressed the negative effects of the [narrow construction previously adopted by some courts]."). The Court relied on both this "chronology" and on all the relevant "statutory language" in reaching its conclusion, not on the bare use of the word "any" wrenched from all context. *Id.* at 58.

For the reasons discussed above, both the statutory language, taken as a whole, and the context of the 1996 Act's enactment demonstrate that section 253(a) is at best ambiguous on the issue presented here. Accordingly, *Salinas*, like *Raygor*, *Gregory*, and all the other prior relevant decisions of this Court, in fact supports the position of the FCC and the D.C. Circuit. It does not support the Eighth Circuit's judgment.

Finally, it is worth noting in this regard that the potential encroachment on state sovereignty is markedly greater in this case than in *Salinas*. There is little state "policy" that is harmed by extending federal bribery statutes to state employees who supervise federal prisoners. Here, by contrast, the preemptive reach of section 253(a) implicates an authority that lies at "the heart of representative government," *Gregory*, 501 U.S. at 462 (internal quotation marks omitted) – the State's ability to decide what kinds of services should be provided by its subdivisions. Section 253(a) does not approach the kind of clear statement required to conclude that Congress intended to interfere with a State's judgment on such a core matter of state sovereignty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX
Statutory Provisions

47 U.S.C. § 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply –

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Missouri Revised Statutes § 392.410 (2002)

Certificate of public convenience and necessity required, exception – certificate of interexchange service authority, required when – duration of certificates – temporary certificates, issued when – political subdivisions restricted from providing certain telecommunications services or facilities, expiration date.

392.410. 1. A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter unless a company holds a state charter issued in or prior to the year 1913 which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter, except that any telecommunications company which is providing telecommunications service on September 28, 1987, and which has not been granted or denied a certificate of public convenience and necessity prior to September 28, 1987, may continue to provide that service exempt from all other requirements of this chapter until a certificate of service authority is granted or denied by the commission so long as the telecommunications company applies for a certificate of service authority within ninety days from September 28, 1987.

2. No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunications company offering or providing, or seeking to offer or provide, any local exchange telecommunications

service shall do so until it has applied for and received a certificate of local exchange service authority pursuant to the provisions of section 392.420.

3. No certificate of service authority issued by the commission shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

4. Any certificate of public convenience and necessity granted by the commission to a telecommunications company prior to September 28, 1987, shall remain in full force and effect unless modified by the commission, and such companies need not apply for a certificate of service authority in order to continue offering or providing service to the extent authorized in such certificate of public convenience and necessity. Any such carrier, however, prior to substantially altering the nature or scope of services provided under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, shall apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section.

5. The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority

conferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

6. The commission may issue a temporary certificate which shall remain in force not to exceed one year to assure maintenance of adequate service or to serve particular customers, without notice and hearing, pending the determination of an application for a certificate.

7. No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing to telecommunications providers, within the geographic area in which it lawfully operates as a municipal utility, telecommunications services or telecommunications facilities on a nondiscriminatory, competitively neutral basis, and at a price which covers cost, including imputed costs that the political subdivision would incur if it were a for-profit business. Nothing in this subsection shall restrict a political subdivision from providing telecommunications services or facilities:

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services.

The provisions of this subsection shall expire on August 28, 2007.

8. The public service commission shall annually study the economic impact of the provisions of this section and prepare

and submit a report to the general assembly by December thirty-first of each year.

(L.1987, H.B. No. 360, § A; Amended by L.1996, S.B. No. 507, § A; L.1997, H.B. No. 620, § A; L.2002, H.B. No. 1402, § A)

Missouri Revised Statutes § 392.410 (2001)

Certificate of public convenience and necessity required, exception – certificate of interexchange service authority, required when – duration of certificates – temporary certificates, issued when.

392.410. 1. A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter unless a company holds a state charter issued in or prior to the year 1913 which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter, except that any telecommunications company which is providing telecommunications service on September 28, 1987, and which has not been granted or denied a certificate of public convenience and necessity prior to September 28, 1987, may continue to provide that service exempt from all other requirements of this chapter until a certificate of service authority is granted or denied by the commission so long as the telecommunications company applies for a certificate of service authority within ninety days from September 28, 1987.

2. No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunications company offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a

certificate of local exchange service authority pursuant to the provisions of section 392.420.

3. No certificate of service authority issued by the commission shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

4. Any certificate of public convenience and necessity granted by the commission to a telecommunications company prior to September 28, 1987, shall remain in full force and effect unless modified by the commission, and such companies need not apply for a certificate of service authority in order to continue offering or providing service to the extent authorized in such certificate of public convenience and necessity. Any such carrier, however, prior to substantially altering the nature or scope of services provided under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, shall apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section.

5. The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority con-

ferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

6. The commission may issue a temporary certificate which shall remain in force not to exceed one year to assure maintenance of adequate service or to serve particular customers, without notice and hearing, pending the determination of an application for a certificate.

7. No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services.

The provisions of this subsection shall expire on August 28, 2002.

(L.1987, H.B. No. 360, § A; Amended by L.1996, S.B. No. 507, § A; L.1997, H.B. No. 620, § A)

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Consolidated with Nos. 02-1386 and 02-1405

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IN THE SUPREME COURT
OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL
STATE OF MISSOURI,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

In enacting 47 U.S.C. § 253(a), which bars the states from prohibiting "any entity" from providing intrastate or interstate telecommunications services, did Congress clearly and manifestly deprive the states of the ability to bar their own political subdivisions from entering the telecommunications business?

PARTIES TO THE PROCEEDING

Petitioner is the State of Missouri. The Solicitor General, on behalf of the Federal Communications Commission, and Southwestern Bell Telephone, L.P., also filed petitions for writs of certiorari which the Court granted and consolidated with the State of Missouri's writ.

Respondents here – petitioners at the FCC – are The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield (Missouri), City of Columbia (Missouri) Water and Light, and the City of Sikeston (Missouri) Board of Utilities.

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No. 02-1238
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On Writ of Certiorari to the
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for the Eighth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the court of appeals, filed August 14, 2002, reported at 299 F.3d 949 (8th Cir. 2002), appears at pages A-2 through A-13 of the Appendix to the State's petition for writ of certiorari ("Pet. App."). The court of appeals' order denying rehearing, entered November 20, 2002, appears at Pet. App. A-14. The opinion of the Federal Communications Commission, reported at 16 F.C.C.Rcd. 1157 (2001), appears at Pet. App. A-15 through A-32.

JURISDICTION

The court of appeals entered its judgment on August 14, 2002. That court denied rehearing on November 20, 2002. Petitioner State of Missouri filed its petition for writ of certiorari on February 18, 2003. This Court granted that petition, as well as those filed by the Solicitor General and Southwestern Bell Telephone Company in Nos. 02-1386 and 02-1405, on June 23, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, § 8, cl. 3:
The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .

Constitution of the United States, Article IV, § 4:
The United States shall guarantee to every state in this Union a republican form of government . . . .-

Constitution of the United States, Article VI, cl. 2:
This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Constitution of the United States, Amendment X:
The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

47 U.S.C. § 253(a) (1996):
(a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Mo. Rev. Stat. § 392.410.7 (1997):
No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
(1) For its own use;
(2) For 911, E-911 or other emergency services;
(3) For medical or educational purposes;
(4) To students by an educational institution; or
(5) Internet-type services.
The provisions of this subsection shall expire on August 28, 2002.[1]

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[1] The statute as originally considered by the FCC would have expired in 2002. But its life was extended; the "sunset" clause now reads, "The provisions of this subsection shall expire on August 28, 2007." Mo. Rev.

INTRODUCTION AND STATEMENT

Section 392.410.7 Mo. Rev. Stat. (1997) addresses the authority of political subdivisions of the State of Missouri with regard to telecommunications services. It became effective on August 28, 1997. It joined a long list of Missouri statutes that define the authority of particular offices, agencies, and subdivisions of the State. It permits a political subdivision to allow nondiscriminatory use of its rights of way and to provide certain kinds of telecommunications services or facilities, such as those for its own use, for emergency services, medical or educational purposes, or Internet-type services. But it denies political subdivisions the authority to provide or offer for sale the kind of telecommunications service for which a certificate of service authority is required, *e.g.*, commercial telephone service.

The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Columbia Water and Light, and the City of Sikeston Board of Utilities (the "Missouri Municipals") filed a joint petition on July 8, 1998, with the Federal Communications Commission (FCC), claiming that § 392.410.7 is preempted by 47 U.S.C. 253(a) (1996). Section 253(a), part of the Telecommunications Act of 1996, bars state or local laws from prohibiting or having the effect of prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service."

This was the second time that the FCC had been asked to invoke § 253(a) to preempt state laws that reign in state subdivisions that wish to engage in

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Stat. § 392.410.7 (Supp. 2002).

the telecommunications business. Soon after the Missouri Municipals' filing, the FCC issued an order denying the City of Abilene, Texas's request to preempt Texas statutes that were similar to § 392.410.7. *In re: City of Abilene Petition for Preemption*, 13 F.C.C.Rcd. 3460 (1997) The Texas laws, §§ 54.001, 54.201-.202 Tex. Util. Code, prohibit municipalities from obtaining certificates to provide telecommunications services or from selling those services, directly or indirectly, to the public. While the Missouri Municipals' petition was pending before the FCC, the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision not to preempt the Texas statutes. *City of Abilene, Texas v. Federal Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999).

The State of Missouri filed comments with the FCC, asserting its right to control the activities of its own political subdivisions. The State urged the FCC to deny the Missouri Municipals' petition. On January 12, 2001, the FCC issued its order, following the D.C. Circuit's holding in *City of Abilene* and declining to hold that the Missouri law was preempted by § 253(a). Pet. App. A-15 - A-33.

The Missouri Municipals appealed the FCC's decision to the U.S. Court of Appeals for the Eighth Circuit. The State of Missouri intervened to defend its statute – and, more generally, its right to define the authority of its own political subdivisions. Departing from the D.C. Circuit's holding in *City of Abilene*, the Eighth Circuit reversed the FCC's decision. Pet. App. A-2 - A-13. The Eighth Circuit ruled that the term, "any entity," is both broad and clear, that municipalities are "entities," and that the States thus cannot in any way prevent municipalities and other political subdivisions from

engaging in the commercial telecommunications business.

The State of Missouri, the FCC, and Southwestern Bell Telephone, L.P. each filed petitions for writs of certiorari. The Court granted and consolidated those petitions.

SUMMARY OF ARGUMENT

This appeal addresses the impact of § 253(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253(a) (1996), on the ability of the States to define the authority of their own political subdivisions. Section 253(a) bars States and local government from "prohibiting . . . any entity" from engaging in telecommunications services. According to the Eighth Circuit, § 253(a) even bars a state from preventing its own political subdivisions from entering the telecommunications business. So read, § 253(a), would exceed congressional authority.

The constitutional separation of powers ensures not just a division among the executive, legislative, and judicial branches, but also a division between the states and the federal government. This diffusion of power operates in various ways to protect American liberty. But it only works if the states retain some areas of sovereignty, areas that Congress cannot penetrate. The ability of States to define the authority of their own political subdivisions is such an area.

The States are not compelled to divide and delegate their power to political subdivisions – though they all do so, to varying degrees. When a State does delegate power to a subdivision, it does not hand the subdivision plenary authority; the

authority is always circumscribed in some fashion. For municipalities, geographic limitations are the most obvious. But States impose functional limitations as well – limitations that focus cities and other subdivisions on the tasks for which they were created, and that limit their ability to jeopardize success by engaging in peripheral ventures. Missouri's choice to circumscribe the authority of its political subdivisions to enter the telecommunications business is such a limitation. It enforces the policy of the State to leave most commercial business in private hands, avoiding the risks of both unfair, government-subsidized competition, and commercial failure that could redound to the detriment of the cities – and, ultimately, to the detriment of the State of which the cities are merely subdivisions.

In § 253(a), Congress limited state authority. Qualified by other provisions of the Telecommunications Act of 1996, States now cannot prohibit private persons or companies from entering the telecommunications business. Congress derives its authority to impose that limit from the Commerce Clause. But even Commerce Clause authority has boundaries. And one of those boundaries, principally derived from the Tenth Amendment, is where the action would infringe on some inviolable area of state sovereignty. The constitutional scheme of dividing powers between the States and the federal government, embodied in the limited authority granted to Congress in Article II and the retained authority of the States confirmed in the Tenth Amendment, simply will not countenance Congress forcing the States to choose between having no subdivisions at all and permitting government to enter businesses that the state's legislature, as the representative voice of the citizenry, deems to be outside the scope of its proper

function.

The power to define the authority of subdivisions it may create, and for which it is ultimately responsible, is of paramount importance in retaining state sovereignty. If Congress could constitutionally usurp that power, it could control many of the essential functions of the States. By doing so, Congress would eliminate the protections – and accountability – that the separation of federal and state powers was designed to ensure. That result cannot be justified by the possibility that a State may, by keeping a potential governmental competitor out of the marketplace, have some impact on interstate commerce. Again, if § 253(a) is read to permit Congress to usurp the States' power to regulate their own political subdivisions, it must exceed congressional power. Thus § 253(a) must be read, if possible, to stop short of that line.

In order to avoid burdening the States with congressional decrees that perhaps inadvertently cross the line, this Court has imposed a particular standard on Congress: whenever Congress extends its regulation to the activities of States (acting as states, as opposed to states voluntarily entering the marketplace), it must do so with "clear and manifest" language. Assuming that § 253(a) could be logically read to bar the States from regulating themselves and their own subdivisions, that reading is not "clear and manifest." Generalized terms like "any entity" simply do not contain the kind of precision this Court has insisted – appropriately, given the need to protect state sovereignty – that Congress provide.

There is an alternative reading of § 253(a) that avoids the collision between the Commerce Clause and the Tenth Amendment: to exclude from "any

entity" those whose statutes and regulations are being barred – *i.e.*, state and local governments.

ARGUMENT

I. If § 253(a) barred States from regulating their own political subdivisions, it would be beyond the scope of congressional authority.

If § 253(a) included state subdivisions among the "entities" that neither States nor local governments can prohibit from entering the commercial telecommunications business, it would usurp the States' authority to define their own administrative and political structures. Such usurpation would fall outside the scope of congressional authority.

A. The ability to define the authority of their subdivisions is a fundamental part of the states' "inviolable sovereignty."

Separation of powers is a key element of our constitutional scheme. Such separation

> protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. U.S., 505 U.S. 144, 187 (1992). In *Printz v. U.S.*, the Court reemphasized that the division of "power among sovereigns" – *i.e.*, between the federal government and the sovereign States – is critical to the protection of liberty:

> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Printz v. U.S., 521 U.S. 898, 921 (1996), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Court pointed out that the Founders believed that dividing powers among the branches of the federal government and then between the federal government and the States gives a "double security . . . to the rights of the people." The Federalist No. 51, at 323, quoted in *Printz v. U.S.*, 521 U.S. at 922.

For the "separation of the two spheres" to be an effective check against "tyranny and abuse," it must ensure the accountability of the competing levels of government. As Justice Kennedy explained: "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States v. Lopez*, 514 U.S. at 549, 577 (1995) (Kennedy, J. concurring). The citizens "must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Id.* at 577-78. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

This Court most recently referred to the danger of merging the spheres of federal and state authority in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 769 (2002) (*S.C. Ports*):

> By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, . . . we strive to maintain the

> balance of power embodied in our Constitution and thus to "reduce the risk of tyranny and abuse from either front."

Id. at 769, quoting *Gregory v. Ashcroft*, 501 U.S. at 438. The Court reiterated that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *S.C. Ports*, 535 U.S. at 751 (2002), quoting *Gregory v. Ashcroft*, 501 U.S. at 457.

"Dual sovereignty" contemplates substance and not just form, *i.e.*, that the sovereign States have powers independent of – and that cannot be overruled by – those of the federal government. Thus this Court observed that the "Constitution instead 'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. U.S.*, 505 U.S. at 188, quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). The Court has given some, though not complete, definition to that "inviolable sovereignty."

The Court has "acknowledge[d] that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *F. E. R. C. v. Mississippi*, 456 U.S. 742, 761 (1982). The Court has never catalogued the "fundamental decisions" that lie beyond congressional control. But it has quoted the Founders, who observed generally that the States' retained powers "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961), quoted in *Gregory v. Ashcroft*, 501 U.S. at 458. And the Court has confirmed that there are "State activities and State-owned property

that partake of uniqueness from the point of view of intergovernmental relations," and declared that some activities "inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing." *State of New York v. U.S.*, 326 U.S. 572, 582 (1946). *See also Coyle v. Oklahoma*, 221 U.S. 559 (1911).

The class of power that is "inherent" in state sovereignty includes the power to create and define the authority of political subdivisions. Subdivisions of States, including cities, counties, municipalities, and other such organizations, have no independent right to act, or even to exist. In fact, this Court has used a contrast with that relationship to explain the relationship between the States and the Federal government: "States are not mere political subdivisions of the United States." *New York v. U.S.*, 505 U.S. at 188.

Indeed, this Court has recognized the plenary authority of the States over their political subdivisions, pointing out that municipalities owe their very existence to the State. For example, in *Hunter v. City of Pittsburg*, 207 U.S. 161, 178 (1907), the Court observed that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them," and that the "number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state."

A few years later, the Court reiterated that any limitation of the States' ability to regulate their political subdivisions is to be found in state constitutions, not federal law:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. . . . However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.

City of Trenton v. State of New Jersey, 262 U.S. 182, 187 (1923) (footnote omitted), citing *Barnes v. District of Columbia*, 91 U. S. 540, 544 (1875). *See also City of Trenton*, 262 U.S. at 185-86 ("The city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it.").

The Court later reiterated that "[a]s the denomination 'political subdivision' implies, [these] local governmental units . . . derive their authority and power from their respective States," *National League of Cities v. Usery*, 426 U.S. 833, 856 n. 20 (1976) (*Usery*), and that "fundamentally, a municipality is merely a political subdivision of the State from which its authority derives," *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 215 (1984).

More recently, the Court found it was "well settled that local government units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). And just last Term, the Court quoted that conclusion from *Mortier*, then confirmed, "Whether and how to use that discretion is a question central to state self-government." *City*

of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 437 (2002).[2] *See also Holt Civil Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) ("affirming that States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them."), quoted in *City of Columbus v. Ours Garage*, 536 U.S. at 437.

The State's grant of power to a subdivision is not permanent; the State may "at its pleasure, . . . modify or withdraw all such powers, ... or vest [them] in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation." *Hunter v. Pittsburg*, 207 U.S. at 178-179. Put another way, the State may "strip [a municipality] of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses." *Barnes v. District of*

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[2] In *Ours Garage*, the court went on to observe that "[o]rdinarily, a political subdivision may exercise whatever portion of state power the State. under its own constitution and laws, chooses to delegate to the subdivision." *Id.* at 428-429. The question in *Ours Garage* was whether the State could delegate authority, not, as here, whether it could withhold or withdraw such a delegation. The court observed that if Congress had included in 49 U.S.C. § 14501(c), a separate "reference at all to 'political subdivision[s] of a State,'" instead of referring only to "the 'safety regulatory authority of a State,'" the reference to "State" "would have undoubtedly embraced both state and local regulation." *Id.* at 432. That conclusion is a logical result of the manifest interrelationship between states and the subdivisions they create – a relationship in which a subdivision exists at the pleasure of, and wields only the authority granted to them by, the State.

Columbia, 91 U.S. 540 at 544-45. *See also City of Trenton*, 262 U.S. at 187 ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.").

The preeminent position of the State vis-a-vis its subdivisions is true in Missouri, as elsewhere. When a Missouri state subdivision – a school district – was before this Court, Justice Kennedy observed: "Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri." *Missouri v. Jenkins*, 495 U.S. 33, 64 (1990) (Kennedy concurring). *See Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997) ("It is an established principle that local governments have no inherent powers but are confined to those expressly delegated by the sovereign and to those powers necessarily implied in the authority to carry out the delegated powers."); *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. Banc 1985) ("A municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly or impliedly granted it by the state.").

That rule is embodied in various parts of the Missouri Constitution, including in its provision regarding charter cities – the state subdivisions with the broadest authority:

> Any city which adopts, or has adopted a charter for its own government, shall have all the powers which the General Assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of the state and *are not limited or denied* either by the charter so adopted *or by*

statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Art. VI, Section 19(a), Missouri Constitution (emphasis added). Exercising its power to define the authority of state subdivisions, Missouri specifically authorizes, but also regulates, municipal utilities in Mo. Rev. Stat. Chapter 91. Missouri, then is among the states in which the question of local government authority is within the State's "absolute discretion" (*Hunter v. City of Pittsburg*, 207 U.S. at 178).

That the States must be able to maintain such control without undue congressional interference is reinforced by a clause of the constitution that this Court has been extremely reluctant to enforce, Article IV, § 4. That clause "guarantee[s] to every state in this union a republican form of government." As Justice O'Connor has observed, however, "It is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution, Art. IV, § 4." *South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O'Connor, dissenting). A state that no longer can structure itself – one whose legislature, as the voice of the people, can no longer decide what authority to delegate and to which kind of subdivision – may no longer have a "republican form of government."

But this Court need not break new Guarantee Clause ground. To "withhold, grant or withdraw powers and privileges" (*City of Trenton v. State of New Jersey*, 262 U.S. at 187) from the subdivisions it creates is not just a "traditional prerogative of the states," *Ours Garage*, 536 U.S. at 428. It is, to borrow language from *F.E.R.C. v. Mississippi*, 456 U.S. at 761, a "quintessential attribute" of

sovereignty. To permit Congress to usurp the states' authority to "withhold, grant or withdraw powers and privileges" (*City of Trenton*, 262 U.S. at 187) would threaten "one of the Constitution's structural protections of liberty" (*Printz*, 521 U.S. at 921). And when a State subdivision, released from state strictures by a distant Congress, runs amok, the people have no effective "means of knowing which of the two governments to hold accountable." *U.S. v. Lopez*, 514 U.S. at 576-577 (Kennedy, J. concurring). Absent a specific grant of authority to Congress that permits the federal government to interfere, States must and do retain the ability to define the authority of the political subdivisions that they themselves create – again, "a question central to state self-government." *Ours Garage*, 536 U.S. at 437.

B. The Commerce Clause does not give Congress the power to usurp the States' power to regulate their political subdivisions.

The Eighth Circuit held that Congress deprived the States of their sovereign power to define the authority of their political subdivisions. Specifically, the court of appeals decided that Congress gave a state's political subdivisions the authority to enter the commercial telecommunications business even though the very laws under which those subdivisions were created and continue to exist deny them that authority. The Eighth Circuit did not expressly identify the source of Congress' power to so interfere with state sovereignty. But the court's citation to *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *see* Pet. App. A-7 et seq., implicitly confirms that the purported source of congressional power must be the Commerce Clause, *i.e.*, the power of Congress to "regulate

commerce . . . among the several states." U.S. Constitution, Art. I § 8.

The Commerce Clause is broadly worded. And its application has expanded as "[e]nterprises that had once been local or at most regional in nature ha[ve] become national in scope." *U.S. v. Lopez*, 514 U.S. at 556 (1995). But even this Court's "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *U.S. v. Lopez*, 514 U.S. at 556-57. The statute at issue here approaches one of those limits: the point at which the power of Congress under the Commerce Clause meets the power of the states to determine their own organization and structure – *i.e.*, to exercise an "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

The admittedly broad language of the Commerce Clause, which could conceivably be read to permit Congress to dictate the States' decisions with regard to autonomy of their subdivisions, does not compel a conclusion that Congress can run roughshod over all attributes of state sovereignty, merely because individually or in the aggregate they could affect interstate commerce. Even in its seminal decision extending Commerce Clause power vis-a-vis the States, the Court recognized that "the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for '[b]ehind the words of the constitutional provisions are postulates which limit and control.'" *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985), quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). One of those "postulates" is the position of the States, discussed above. But another is the

historical intent of the Commerce Clause.

As Justice Stevens observed, "It is important to remember that [the Commerce Clause] was the Framers' response to the central problem that gave rise to the Constitution itself." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 244 (1983) (Stevens concurring). He quoted Justice Rutledge's description of that "central problem": "'to secure freedom of trade, to break down the barriers to its free flow.'" *Id.* quoting W. Rutledge, *A Declaration of Legal Faith* 25-26 (1947).

Though the Commerce Clause was intended only to "break down the barriers" to the "free flow" of trade, the Court has construed it to cover a broad range of activities. The Court has recently "identified three broad categories of activity that Congress may regulate under its commerce power": "to regulate the use of the channels of interstate commerce"; "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and "to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." *U.S. v. Lopez*, 514 U.S. at 558-559. Were Congress to eliminate Mo. Rev. State. 392.410.7, it would not be "regulat[ing] the use of channels of interstate commerce." Nor would it be regulating or protecting any instrumentality of or person engaged in interstate commerce. It would merely be overriding the State's decision not to enter, via its political subdivision, interstate commerce as a vendor. If that fits within the three-fold description of Commerce Clause power at all, it must be described as an activity that has a substantial relation to interstate commerce.

In determining what "substantially affect[s] interstate commerce," the Court has permitted Congress to aggregate effects of seemingly local acts, perhaps even acts akin to a city's decision whether to enter the commercial telephone business. But as Justice Breyer recently explained, extending the aggregation principle too far threatens to erase the "distinction between national and local authority":

> Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority."

U.S. v. Morrison, 529 U.S. 598, 660 (2000) (Breyer dissenting) (citations omitted), quoting 529 U.S. at 615-16..

That threat is particularly real when the activities being aggregated are those at the core of state responsibility. And at that point — when Congress is attempting to control not the state's regulation of private commerce, but the "States as States," *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 265, 287 (1981) (*Hodel*) – a specific constitutional limitation, the Tenth Amendment comes into play. The Tenth Amendment gives critical definition to the "Constitution's distinction between national and local authority." *U.S. v. Morrison*, 529 U.S. at 615. That Amendment, and its assurance of the states' continued sovereignty, explains why "the States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." *Usery*, 426 U.S. at 854, quoted with approval,

Hodel., 452 U.S. at 286. Thus

> when Congress attempts to directly regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

Hodel, 452 U.S. at 286-287, quoting *Usery*, 426 U.S. at 845.

In *Usery*, the Court found a line between congressional power under the Commerce Clause and state power under the Tenth Amendment at the point where Congress was dictating the terms of state employment. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court reversed that holding. In doing so, the Court did more than find the line in a different place; it directed the States to look to Congress, not the courts, to protect their sovereignty. 469 U.S. at 552. The Court thus headed toward the position that Justice Douglas had criticized some years before: "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *State of New York v. U.S.*, 326 U.S. at 594 (Douglas, J. dissenting).

Since *Garcia*, however, the Court has reasserted some authority to protect the states' sovereignty from Commerce Clause-based usurpation. Justice Kennedy explained the rationale. He cited "Madison's observation that 'the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.'" The Federalist No. 46, p. 295 (C. Rossiter ed.

1961), and explained that it "can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment." *U.S. v. Lopez*, 514 U.S. at 577 (Kennedy, J. concurring). But he then observed that the mere fact there was a political role did not entirely remove the judiciary from the scene:

> [T]he absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, . . . the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Id. at 578.

Justice Kennedy pointed out that the judiciary has found lines between state and federal power without congressional action in the

> exposition of doctrines such as abstention, . . . the rules for determining the primacy of state law, . . . the doctrine of adequate and independent state grounds, . . . the whole jurisprudence of preemption, . . . and many of the rules governing our habeas jurisprudence.

Id. at 578 (citations omitted). But he recognized that the Court has found it difficult "to preserve this principle under the Commerce Clause." He referred to Justice Frankfurter's observations:

> "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of

> judicial qualities." [F. Frankfurter, *The Commerce Clause under Marshall, Janey and Waite* (1937) at 66-67]. But as the branch whose distinctive duty it is to declare "what the law is," *Marbury v. Madison*, 1 Cranch [137] 177 [(1803)], we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines.

U.S. v. Lopez, 514 U.S. at 579 (Kennedy, J. concurring).

Justice Kennedy conceded the difficulty of the task. He recognized the "substantial element of political judgment in Commerce Clause matters." *Id.* He quoted Justice O'Connor, who a few years earlier observed that this Court "cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment), quoted in, *U.S. v. Lopez*, 514 U.S. at 579 (Kennedy, J. concurring). Justice Kennedy then expressly rejected the premise – which some derive from *Garcia* – that this Court's cases teach that it has "no role at all in determining the meaning of the Commerce Clause." *U.S. v. Lopez* 514 U.S. at 579. In fact, he pointed out, the Court has a long history of enforcing the dormant Commerce Clause – despite the absence of any language in the Constitution expressly setting out that "Clause." *See id.* at 579.

The Tenth Amendment, unlike the Dormant Commerce Clause, does have language. But that language does not express the entirety of the Amendment's protection for the States. The Court has observed that the Tenth Amendment's limitation

> is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.
>
> Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id. at 156-157.

The separation between congressional authority under the Commerce Clause and state authority protected by the Tenth Amendment is a "close and difficult line." But this Court has recognized that the line cannot be stretched too far; it must leave the States with "a significant measure of sovereign authority." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 549; quoting *E.E.O.C. v. Wyoming*, 460 U.S. at 269 (Powell, J. dissenting). Thus, when faced with Commerce Clause legislation that nears the "limits that . . . reserve power to the States" (*New York v. U.S.*, 505 U.S. at 157), this Court has often reiterated the importance of preserving the States' sovereignty. For example, the Court has

> warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

U.S. v. Lopez, 514 U.S. at 557, quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 22, 37 (1937). In *Jones & Laughlin Steel*, the Court affirmed that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds." *U.S. v. Lopez*, 514 U.S. at 557. Defining

the authority of state subdivisions, one of the quintessential attributes of sovereignty, must be outside the scope of those bounds.

There are times, of course, when a State voluntarily steps across the boundary, leaving its "inviolable sovereignty" behind and becoming subject to congressional Commerce Clause power. This Court has recognized "a Constitutional line between the State as government and the State as trader." *State of New York v. U.S.*, 326 U.S. at 579 citing *State of Ohio v. Helvering*, 292 U.S. 366, 369 (1934). When a State enters the marketplace, it accepts the burdens that Congress imposes on private traders. *Helvering*, 292 U.S. at 369. To cite one example, a State accepts the burdens of congressional regulation when it chooses to enter the railroad business. *See United States v. California*, 297 U.S. 175 (1936). The same would be true if the State of Missouri entered the telecommunications business, either directly or through its political subdivisions.

But Missouri has chosen not to take that step. The Eighth Circuit, in its opinion below, 299 F3d. 949 (8th Cir. 2002) nonetheless subjected Missouri's internal decision making to Congressional veto. It ignored this Court's mandate under the Tenth Amendment "to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. U.S.*, 505 U.S. at 157. The definition of the authority of state subdivisions is an "incident of state sovereignty" that merits protection. Had Congress used its Commerce Clause power to usurp Missouri of that power, it would have exceeded its authority under the Commerce Clause. But, as discussed below, § 253(a) can and must be read to have a narrower, fully constitutional impact.

II. By choosing a generality – "any entity" – instead of specifically limiting the States' historic power to define the authority of their political subdivisions, Congress did not extend its Commerce Clause power to have that limiting effect.

A. Congress only preempts the States' historic sovereign powers when it uses language that is clear and manifest.

Rather than address congressional power, this case has devolved into an argument about whether by using the term, "any entity," Congress clearly and unmistakably demonstrates an intent to preempt state law. The demand for such clarity derives from the federalism concerns discussed above. Rather than address the Tenth Amendment directly each time a congressional act could be read to apply to the States in their sovereign role, this Court has developed a strict standard that applies when Congress works along the edge of its authority vis-a-vis the States. When the Court considers federal laws that affect the States' historic powers, it holds those powers to have been removed only when that "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (*Rice*). That standard protects the states' sovereignty in two ways: directly, by interpreting federal legislation, where possible, to draw back from the edge of congressional authority; and indirectly, by empowering the states – on notice because of the clear language of pending legislation – to mobilize their efforts to defeat the proposal in the legislative, rather than the judicial arena.

In the last 20 years, this Court has consistently insisted on congressional compliance with the "clear

and manifest" standard. And it has reiterated the reason for that standard, *i.e.*, its recognition that the "states occupy a special and specific position in our constitutional system," (*Garcia v. San Antonio Metropolitan Transit Auth.* 469 U.S. at 547) and that the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" *Id.* at 572, quoted in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

The demand for unmistakably clear language finds a definitive statement, in the context of issues that go to the core of state sovereignty, in *Gregory v. Ashcroft*. There this Court reiterated its demand that Congress "make its intention 'clear and manifest' if it intends to preempt the historic powers of the States." 501 U.S. at 461. *See also Essex Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemption will not lie unless it is "the clear and manifest purpose of Congress"), citing *Rice*, 331 U.S. at 230. Since *Gregory*, the Court has continued to demand that kind of clarity from Congress. *E.g.*, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997); *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

In many of the cases where a demand for a "clear and manifest" statement has been brought to this Court, the power of Congress to bind the states is unquestioned – as, for example, when Congress is using its authority under section 5 of the Fourteenth Amendment. *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). The standard should be even more strictly applied where Congress is working at the edges of – if not beyond

– its Commerce Clause authority.

B. A general reference to "any entity" does not clearly nor manifestly preempt state authority.

Preventing the States from regulating the commercial activities of themselves and their subdivisions, assuming that Congress was constitutionally authorized to usurp state sovereignty by, the question would be whether Congress' intention to do so was "clear and manifest." It was not.

Unlike the Fair Labor Standards Act (*see Garcia*, 469 U.S. at 556), for example, the Telecommunications Act does not contain, in § 253(a) or else-where, a pertinent definition or provision that refer-ences the ability of the States or their subdivisions to engage in the commercial telecommunications business. The *sole* basis for the Eighth Circuit's holding, and the arguments of respondents to that court and to the FCC, is that "any entity" is an all-inclusive term. Where the Eighth Circuit here and the D.C. Circuit in *City of Abilene* differed was in their conclusions upon applying the "clear and manifest" standard to the isolated words, "any entity."

The use of broad terms in federal statutes is certainly not unusual – indeed, "any entity" is used elsewhere in the United States Code, though, fortunately, usually with more definition than § 253(a) provides. *E.g.*, 7 U.S.C. § 87(b)(2); 11 U.S.C. § 557(g)(1); 11 U.S.C. § 1126(c); 33 U.S.C. § 1502(2); 47 U.S.C. § 303c(b)(2).

A similarly broad term, "person" is also used at various places in the Code. *E.g.*, 15 U.S.C. § 13a; 17 U.S.C. § 506(a); 42 U.S.C. § 1983. And when

this Court applied the "clear and manifest" standard to "person," it found that term wanting. In *Will v. Michigan Dept. of State Police*, the Court held that "every person," as used in 42 U.S.C. § 1983, did not include a state, even though a State fits within some definitions of "person." 491 U.S. at 65. The Court demanded that Congress "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.*, quoting *Rice*, 331 U.S. at 230. "Every person" was not, this Court held, clear enough – even when Congress was exercising its undisputed authority under § 5 of the Fourteenth Amendment.

To distinguish "any entity" from "every person," the Eighth Circuit took its definition of "entity" from Black's Law Dictionary. According to that court, "[a]n entity is '[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." BLACK'S LAW DICTIONARY, 553 (7th ed. 1999), quoted, Pet. App. A-9. But a myopic focus on that definition suggests clarity that simply does not exist. There are other definitions of "entity" that do not necessarily correspond to the one used by the Eighth Circuit. For example, an "entity" may be "something that exists independently, not relative to other things." THE AMERICAN HERITAGE DICTIONARY (NEW COLLEGE EDITION, 1981), p. 437.

Local governments do not, of course, "exist independently"; they exist only as subdivisions of the States. Using the Eighth Circuit's parlance and this Court's precedent, they do not have a "legal identity" apart from the State of Missouri. They could be considered "entities" within the Telecommunications Act only if something becomes

an "entity" merely by virtue of being "a particular and discrete unit." But such a definition has no rational limit.

In fact, neither the Eighth Circuit, in its decision, nor the Missouri Municipals, at any point in this proceeding, has provided a definition that places any limit, much less a rational one, on its scope. The Missouri Municipals entirely avoid drawing any line around "entities." They certainly would call cities and the utilities they create and control "entities." But the same would be true, logically, for school, water, conservation, and fire protection districts. And there is no logical distinction – given the dictionary definitions, at least – between those "entities" and the Missouri Coordinating Board for Higher Education, the Board of Curators of the University of Missouri, the Missouri Public Service Commission, and the Missouri Department of Conservation. Even the Office of the Attorney General and the Missouri Supreme Court are "entities." Under a logical extension of the Eighth Circuit's reading of the law, Congress has preempted any state law that prevents any "entity" created and regulated by the State of Missouri – down to the Interior Designer Council – from entering the commercial telecommunications business.

When the State pointed out the necessary result of defining "any entity" to include every office, agency, and subdivision that a State creates, the Eighth Circuit responded by denigrating the argument as "highly fanciful" (Pet. App. A-13). If that is true, it is only because those who manage most state agencies and subdivisions will be wise enough to choose against departing from their state-defined missions by becoming vendors in the commercial telecommunications market. Though

such individual wisdom may make the parade of horribles unlikely, calling the argument "fanciful" does not defeat it. The fact remains that the Eighth Circuit's interpretation of "any entity" is all-encompassing.

The Eighth Circuit rests its rejection of the D.C. Circuit's rationale in *City of Abilene* not just on its own selection of dictionary definitions, but on its observation that the D.C. Circuit did not consider *Salinas v. United States*, 522 U.S. 52 (1997). Pet. App. A-11. The Eighth Circuit finds *Salinas* crucial to understanding the effect of the word "any." In *Salinas*, this Court ruled that a federal bribery statute applicable to "any business transaction" includes bribes of state officials. *Id.* at 60. Mario Salinas tried to overturn his conviction for bribery. He was a state official (chief deputy at a jail). Salinas claimed that "any business transaction" could only apply to federal funds. He argued that otherwise, it would upset the federal-state balance of powers. The Court rejected that argument.

"Any business transaction" in the context of criminal bribery is not comparable to "any entity" in the context of the provision of telecommunication services. No state will claim that a federal statute criminalizing bribery related to "any business transaction" will violate its Tenth Amendment protections or upset the delicate balance of power between the federal government and the states. That is because no state has a sovereign interest in protecting criminals who would corrupt government by bribing public officials – federal or state. The statute at issue in *Salinas* simply does not interfere with the State's governance of its own political subdivisions. Section 253(a) does.

That "any entity," so broadly defined, does not

clearly and manifestly include the states and their subdivisions is additionally evident from the fact that beyond the Eighth Circuit, another court of appeals, two state supreme courts, a third state appellate court, a federal district court, and the federal administrative agency commissioned with implementation of the Telecommunications Act of 1996 disagree on the whether the term "any entity" extends to municipalities. *See City of Abilene, Texas v. Federal Communications Comm'n.*, 164 F.3d 49; *Iowa Tel. Ass'n. v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999); *In Re: Application of Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb. 2002); *Municipal Elec. Auth. of Ga. v. Georgia Pub. Serv. Comm'n.*, 525 S.E.2d 391 (Ga. App. 1999); *City of Bristol v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001); *In re: City of Abilene Petition for Preemption*, 13 F.C.C.Rcd. 3460 (1997); *In re: Missouri Municipal League Petition for Preemption*, Pet. App. A-15 - A-33.[3] This split among the courts – regardless of which ones correctly discerned congressional intent – demonstrates that the congressional language is neither clear nor manifest. Thus, to paraphrase this Court's language in *Ours Garage*, 536 U.S. at 426, "Absent a basis more reliable than statutory language insufficient to demonstrate a 'clear and manifest purpose' to the contrary, [this Court] should resist attribution to Congress of a design to

[3] The certainty found by the Eighth Circuit is also hard to reconcile with the undefined use of the term, "ability" in § 253(a). Congress has barred states from prohibiting or having the effect of prohibiting "the *ability* of any entity to provide any interstate or intrastate telecommunications service." (Emphasis added.) Section 392.410.7 does not address "ability"; it addresses only the *authority* of Missouri political subdivisions to extend their reach into telecommunications service.

disturb a State's decision" on the delegation of authority by the State to its political subdivisions.

C. Nothing in the legislative history of § 253(a) manifests congressional intent to include the States and their subdivisions among the entities that States and local governments cannot control.

This Court's demand for "clear and manifest" language in the statute eliminates any legitimate basis for searching the legislative history of the Telecommunications Act. But such a search would be unavailing in any event. The most that respondents can point to is a patchwork of out-of-context statements – statements that would be insufficient to warn the States that Congress might be usurping their power.

That is what the Missouri Municipals did before the Eighth Circuit. First they cited the Congressional history of the Telecommunications Act of 1996 and a predecessor bill, S.1822, 103d Cong., 2d Sess. (1994), to note that Congress discussed the prohibition contained in the Public Utility Holding Company Act of 1935 (PUHCA) to PUHCA-regulated companies' providing telecommunications services. The Missouri Municipals argued that if Congress intended PUHCA-regulated companies to fall within the meaning of "any entity," used in the context of § 253(a), that is evidence that "any entity" must include political subdivisions of states. That argument ignores the basic fact that neither states nor their political subdivisions are regulated under

the PUHCA.[4]

The Missouri Municipals also argued below that Congress knew how to use the terms "states" and "political subdivisions" and would have expressly excluded them from § 253(a) if that were Congress' intent. That logic can be equally used to assert that Congress, in drafting the Telecommunications Act, demonstrated cognizance of the terms "states" and "political subdivisions" (or, to use the § 253(a) language, "local" governments), and could have expressly included those terms within "any entities" in § 253(a). Indeed, knowing of the precedents insisting on "clear and manifest" language to extend such generalities to include the States, Congress would have done so had it really intended to take the drastic step of invading the State's authority to regulate their own municipalities. But nothing in the history of § 253(a) states that Congress intended to extend the law so far, *i.e.*, to restrict the way States organize themselves through and delegate authority to political subdivisions.

But again, the legislative history if irrelevant. And, assuming that § 253(a) can even be logically read to bar the States from regulating their own subdivisions, and that Congress has the power to take that step, nothing in the statutory language makes clear that is what Congress intended. In the absence of such clarity, this Court's precedents demand that the statute be interpreted not to approach, much less cross, the constitutional line

---

[4] PUHCA regulates "holding companies," i.e., companies that own the stock of entities providing utility service. Missouri's constitution restricts the ability of cities and political subdivisions from holding stock in corporations or associations. Art. VI, § 23, Missouri Constitution.

protecting state sovereignty. As discussed below, there is a way to read the statute to avoid those complications. And that is the only logical reading of § 253(a).

III. Logically read, § 253(a) excludes the States and local governments from the "entities" they cannot control.

The issue posed here really should be much simpler than the FCC or the Eighth or D.C. Circuits suggest. In fact, the language of the statue itself accommodates only one logical reading.

Section 253(a) does not consist only of the words, "any entity," as someone skimming the Eighth Circuit's opinion might expect. Though short, it does contain a complete sentence:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The sentence describes involvement in telecommunications regulation from two different directions. The first is regulatory, the sources of regulation: (a) "State[s]" and (b) "local" governments. The second direction is the source of competition: "any entity" that wishes "to provide any interstate or intrastate telecommunications service." The Eighth Circuit's reading of the statute makes the sources of regulation part of the source of competition. Unless and until the source of regulation chooses to also become a source of competition, that reading makes no sense.

The fallacy in the Eighth Circuit's reading is evident by replacing the term chosen for the source of competition with the terms chosen for the

sources of regulation, *i.e.*, by replacing "any entity" with a term that the Eighth Circuit says is a subset of that group. Such a statute would read: "No State may prohibit or have the effect of prohibiting its own ability to provide any interstate or intrastate telecommunications service." Or: "No local government may prohibit or have the effect of prohibiting its own ability to provide any interstate or intrastate telecommunications service." Neither sentence makes any logical or policy sense. Though they may be unable to interfere with the decisions of private companies to enter the telecommunications business, obviously States must be able to make the same choices about whether to enter that business themselves.

That the respondents here are municipalities ("local" governments, as referenced in § 253(a)) whose ability to enter the commercial telecommunications business is being restricted by a State does not change the logic. As discussed above, pp. 13-18 *supra*, State subdivisions are not independent organizations, entitled to make decisions without delegated authority. They are constituent parts of the state. To read § 253(a) to prevent the State from determining what powers it has delegated to any constituent part is not a logical, and thus not a permissible, reading of § 253(a).

No provision of the Constitution of the United States recognizes the existence of a city or county, let alone a municipal utility. No clause of the federal constitution prohibits a state from creating its own political subdivisions and delegating powers or authority to those subdivisions. No clause of the federal constitution mandates that the states delegate certain powers to political subdivisions - creatures that exist at the complete discretion of the state. And there is no constitutional reading of

§ 253(a) that replaces the State of Missouri's limited delegation of authority to its political subdivisions with what amounts to carte blanche to become a commercial telecommunications service.

CONCLUSION

For the reasons stated above, the Court should reverse the Eighth Circuit's decision and remand the case with instructions to reinstate the FCC's order denying preemption of Mo. Rev. Stat. § 392.410.7, and thus preserving the States' power to allocate authority to and among their officers, agencies, and political subdivisions.

Respectfully submitted,

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IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a State statute that prohibits municipalities and municipally-owned utilities from providing telecommunications services to the public is preempted by 47 U.S.C 253(a), which provides that "[n]o State * * * statute or regulation * * * may prohibit * * * any entity [from] provid[ing] any * * * telecommunications service."

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BRIEF FOR THE RESPONDENTS

STATEMENT

1. The Telecommunications Act of 1996 ("the Act"), Pub. L. No. 104-104, 110 Stat. 56, "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon, Inc. v. Public Service Commission*, 535 U.S. 635, 638 (2002). The purpose of the Act, Congress stated, was "[t]o promote competition and reduce regulation

in order to secure lower prices and higher quality services for American telecommunications consumers" (Pub. L. No. 104-104, 110 Stat. 56, 56 (1996)). In particular, the Act "fundamentally restructure[d] local telephone markets" by providing that "States may no longer enforce laws that impede competition" (*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999)). Section 253(a) of the Act, 47 U.S.C. 253(a), implements this purpose of the Act by providing as follows:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

This limit on state authority is coupled with Section 253(b), which provides that Section 253(a) does not apply as long as the State law in question is "competitively neutral" and necessary to protect legitimate state interests. Section 253(b) of the Act states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

2. In August, 1997, the State of Missouri amended Mo. Rev. Stat. § 392.410(7) to forbid municipalities and municipally-owned utilities from entering the telecommunications market. Section 392.410(7) (the "Missouri statute") provides that "[n]o political subdivision of this state shall provide or offer for sale * * * a telecommunications service * * * for which a certificate of service authority is required * * *." Under Missouri law, a certificate of service authority is required to provide intrastate interexchange and local exchange telecommunications services to the public. See Mo. Rev. Stat. § 392.410(2).

Section 253(d) of the Telecommunications Act provides that the Federal Communications Commission is required to preempt any State law that violates Section 253(a). 47 U.S.C. 253(d). Accordingly, respondent Missouri municipalities and municipally-owned utilities petitioned the FCC, seeking an order declaring that the Missouri statute was preempted by Section 253(a). Pet. App. 14a-15a.[1]

a. The FCC denied the petition. Pet. App. 14a-41a. The FCC noted that it had previously rejected a similar petition that sought preemption of a Texas statute. *Id.* at 16a, citing *In re Public Utility Commission*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"). In that case, the City of Abilene petitioned the FCC to preempt a Texas statute that also forbade municipalities from providing telecommunications services. The FCC noted that "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services" (13 F.C.C.R. at 3549). The FCC also "encourage[d] states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in [the Texas statute]" (*ibid.*).

Nonetheless, the FCC denied the petition, ruling that the Texas statute was not preempted. 13 F.C.C.R. at 3544. The FCC asserted that under this Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the term "any entity" in Section 253(a) had to be interpreted not to include "political subdivisions of the state" (13 F.C.C.R. at 3547; see *id.* at 3545). In *City of Abilene v. FCC*, 164 F. 3d 49 (D.C. Cir. 1999), the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision.

b. The Commission, relying in part on the *Texas Preemption Order*, denied respondents' petition as well. Pet. App. 14a-45a. The Commission stated that "the legal

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[1] "Pet. App." refers to the appendix to the petition in No. 02-1386.

authorities that we must look to in this case compel us to" reach that conclusion. *Id.* at 23a. But the Commission "reiterate[d its] urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service." *Ibid.*

The Commission explained that it had "found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry" and that "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a. The Commission noted that "municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services" (*id. at* 24a). The Commission rejected the argument that prohibitions on municipal entry could be justified by concerns about "regulatory bias when a municipality acts as both a regulator and a competitor" or about "taxpayer protection from economic risks" (*id.* at 25a); both of those concerns, the FCC said, "can be dealt with successfully through measures that are much less restrictive than an outright ban on entry" (*id.* at 25a-26a). The *Texas Preemption Order* had addressed only municipalities that provided telecommunications services; in rejecting respondents' petition, the Commission extended its ruling to municipally-owned utilities as well. *Id.* at 33a-35a.

3. The United States Court of Appeals for the Eighth Circuit unanimously vacated the Commission's order. Pet. App. 1a-13a. The Eighth Circuit assumed that *Gregory v. Ashcroft, supra,* "requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states" (Pet. App. 6a). The court of appeals also assumed that such a "plain statement" standard applied to Section 253(a). Pet.

App. 6a. Accordingly, the court reasoned, the first question before it was whether the "meaning" of Section 253(a) is "plain"—specifically, whether "the words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule" (Pet. App. 7a).

The court concluded that the words "any entity" do plainly include municipalities and municipally-owned utilities. Pet. App. 7a-13a. The court began by noting that "[t]here is no doubt that municipalities and municipally-owned utilities are entities under a standard definition of the term." *Id.* at 8a. The court quoted the Black's Law Dictionary definition of "entity"—"'[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members'"—and "public entity," "a 'governmental entity, such as a state government or one of its political subdivisions.'" Pet. App. 8a (brackets in original), quoting Black's Law Dictionary 553 (7th ed. 1999). The court of appeals recognized that municipalities are created by the States, and that the States exercise extensive control over them, but the court reasoned that "[t]he plain meaning of the term 'entity' includes all organizations, even those not entirely independent from other organizations." Pet. App. 8a.

The Eighth Circuit then added that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." Pet. App. 8a-9a. The court of appeals noted that "[t]ime and time again" this Court "has held that the modifier 'any' prohibits a narrowing construction of a statute." *Id.* at 9a. The court then cited nine decisions of this Court, including *Salinas v. United States*, 522 U.S. 52 (1997), which, as the Eighth Circuit explained, ruled in an analogous context that the use of the term "any" was a sufficiently plain statement to satisfy the rule of *Gregory v. Ashcroft*. Pet. App. 9a-10a. The court of appeals concluded that "because municipalities fall within the ordinary definition of the term

'entity,' and because Congress gave that term expansive scope by using the modifier 'any,' individual municipalities are encompassed within the term 'any entity' as used in § 253(a)." Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

I. If the words of Section 253(a) are given their plain meaning, then Section 253(a) preempts the Missouri statute. Municipalities and municipally-owned utilities are unquestionably "entities" in the ordinary meaning of that term. Municipalities can sue and be sued; they can enter into contracts and own property; for many purposes, federal law treats municipalities differently from States. This Court has, not surprisingly, routinely used the term "entity" when referring to political subdivisions of States.

Moreover, "any entity" is precisely the phrase Congress would have chosen if it was seeking to be as inclusive as possible: if it meant to foreclose any possibility that a State might exclude a potential entrant from providing telecommunications services. Petitioners point out that Acts of Congress often explicitly limit the term "entity," specifying that only "private entities" or "public entities" are intended. But that just demonstrates that when Congress does not limit or qualify the term—when it refers to "any entity"—it means to encompass all entities, public and private.

There are also powerful reasons, rooted in the pro-competition purposes of the Telecommunications Act, to interpret the phrase "any entity" in Section 253 to include municipalities. As the FCC itself emphasized, municipalities are a singularly important source of competition in telecommunications. The legislative history and the structure of the Telecommunications Act demonstrate that Congress knew of the potential importance of municipal entrants when it adopted Section 253, and that Congress intended to

protect the right of municipalities to enter telecommunications markets.

II. Interpreting Section 253(a) according to its plain meaning does not, contrary to petitioners, produce absurd results, such as empowering State officials to provide telecommunications services over the objection of the legislature. Section 253(b) explicitly reserves to the States ample authority both to avoid absurd or implausible results and to ensure that Section 253(a) will not constitute a substantial incursion on State sovereignty.

Section 253(a) also is not an unprecedented or extraordinary intrusion on the authority of States to regulate matters pertaining to their subdivisions, and it does not raise any substantial constitutional questions. On several occasions, this Court has considered claims that federal statutes limited States' authority over their subdivisions. The Court has sometimes accepted these claims, without ever suggesting that they presented any constitutional issue or any affront to values of federalism. Even when the Court has rejected claims that federal statutes limited States' control over municipalities, it has never suggested that the States' interest in controlling subdivisions could override the plain meaning of the statute, much less that the statute might be unconstitutional.

III. The principle of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), does not justify departing from the plain meaning of Section 253(a). The Court has squarely held that the *Gregory* presumption applies only when a statute is ambiguous, and Section 253(a) is not ambiguous. Even when a statute is ambiguous, the *Gregory* presumption does not automatically require that the statute be interpreted to bar the exercise of federal power.

At bottom, petitioners' contention is that Section 253(a) should not be interpreted to include municipalities and

municipally-owned utilities because Congress did not explicitly mention municipalities in that provision. The Court has never required such an explicit statement in any context, and the Court has rejected outright, on several occasions, the notion that *Gregory* requires such an explicit statement.

ARGUMENT

SECTION 253(a) PREEMPTS MISSOURI'S BAN ON MUNICIPAL ENTRY INTO TELECOMMUNICATIONS MARKETS.

I. Section 253(a), Interpreted According To Its Plain Meaning, Preempts The Missouri Statute.

A. Section 253(a) provides that "[n]o State * * * statute or regulation * * * may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). There is no dispute in this case that Missouri has enacted a statute that prohibits municipalities and municipally-owned utilities from "provid[ing] * * * telecommunications service." If municipalities or municipally-owned utilities are "entit[ies]" within the meaning of Section 253(a), then the Missouri statute is preempted.

Municipalities and municipally-owned utilities are—in the ordinary English usage of the term—unquestionably "entities." Indeed, this point is so clear that the federal petitioners appear not to dispute it. The Black's Law Dictionary definition, quoted by the court of appeals, explicitly defines "entity" to include subdivisions of state governments. The Oxford English Dictionary defines "entity" as "[a] thing that has a real existence, as opp[osed] to a relation, function, etc." The New Shorter Oxford English Dictionary 830 (1993). The dictionary definitions that petitioners quote are all to the same effect. See, *e.g.*, SW Bell Br. 21.

It would be very odd, as a matter of English usage, to say that municipalities and municipally-owned utilities do not have "a real existence" or—even using petitioners' definitions—that they do not "'exist[] as a particular and discrete unit'" (SW Bell Br. 21, quoting Webster's II New College Dictionary 376 (1999)). Petitioners Nixon and Southwestern Bell insist that political subdivisions are not entities because they "are part of the State and dependent upon it for any powers they may be authorized to wield." SW Bell Br. 21; see Nixon Br. 29. It is true, of course, that political subdivisions are created and empowered by the State. But once political subdivisions are created they are, in ordinary usage, "entities" with a "real existence."

Indeed, if municipalities and municipal utilities are not "entities" because they owe their existence and their powers to the State, then private corporations—which are also creatures of State law and also possess only those powers granted them by the State—would also not be "entit[ies]" under Section 253(a), and a State could freely exclude any private corporation from the telecommunications market. That result is obviously wrong, as even petitioners recognize. Similarly, petitioners assert that the term "any entity" is "most naturally read" to apply only to "companies that would otherwise be subject to state regulation" (SW Bell Br. 19). But-this is not a "natural[]" reading at all, even leaving aside the fact that municipalities and, especially, municipally-owned utilities *are* "subject to state regulation."[2] Congress did not say "regulated entities," "entities subject to regulation," or anything of that sort. It used the all-inclusive term "any entity."

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[2] Indeed, petitioner Nixon, the Attorney General of Missouri, forthrightly states: "Missouri specifically authorizes, but also regulates, municipal utilities in Mo. Rev. Stat. Chapter 91." Nixon Br. 16.

Municipalities and municipally-owned utilities can sue and be sued. They can enter into contracts and own property. The Court has repeatedly ruled that municipalities do not partake of the States' sovereign immunity under the United States Constitution. See, *e.g.*, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890). That result would be incomprehensible if municipalities were not entities but just part of the "entity" that is the State. Congress has made municipalities—but *not* States—subject to suit under the Sherman Antitrust Act. Compare *Community Communications Co. v. Boulder*, 455 U.S. 40, 50-51 (1982), with *Parker v. Brown*, 317 U.S. 341 (1943). Congress has treated municipalities—but not States—as "persons," and therefore subject to suit, under 42 U.S.C. 1983. Compare *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), with *Will v. Michigan Department of State Police*, 491 U.S. 58 (2002). Under the False Claims Act, 31 U.S.C. 3729 *et seq.*, as well, municipalities are "persons" that can be sued but States are not. Compare *Cook County* v. *United States ex rel. Chandler*, 123 S. Ct. 1239 (2003), with *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). It is impossible to reconcile those results with petitioners' position that Congress does not regard municipalities as "entities."

But the point is far more basic than that. Simply as a matter of ordinary language, it would be eccentric to assert that the City of St. Louis, for example—or a utility owned by such a city—is not an "entity." Petitioner Southwestern Bell quotes this Court's statement in *Sailors v. Board of Education*, 387 U.S. 105, 107 (1967), that "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities." See Br. 21. But of course the Court's point was that political subdivisions are not "sovereign"—not that they are not "entities." See, *e.g.*, *United States v. Kagama*, 118 U.S. 375, 379 (1886). The

Court's unselfconscious use of the term "entities" in this context just demonstrates how natural it is to describe political subdivisions in that way. And, not surprisingly, the Court has routinely used the term "entity" to describe political subdivisions. See, *e.g.*, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[T]he principle of sovereign immunity bars suits against States, but not lesser entities."); *Monell*, 436 U.S. at 710 (Powell, J., concurring); *Mt. Healthy School District*, 429 U.S. at 280.

B. 1. In fact, the most conspicuous feature of the language of Section 253(a) is its inclusiveness. The language of Section 253(a) evinces a desire to foreclose any possible claim that some potential entrants into the telecommunications market are unprotected by Section 253(a)—the very claim that petitioners make here. The choice of the term "entity" is itself evidence of this: it is hard to think of any term that could be more inclusive. Congress did not choose a narrower and more ambiguous term, such as "person" (see, *e.g.*, *Cook County*, 123 S. Ct. at 1243-45); it did not try to list the various kinds of potential entrants into telecommunications markets that might be covered by Section 253(a). The distinguishing characteristic of the term "entity" is precisely its inclusiveness. It is the word one would use if one wanted to cover the waterfront and omit no possibilities.

If there is any doubt that Section 253(a), interpreted according to its plain meaning, is fully inclusive, that doubt is removed by Congress's use of the term "any." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). As the court of appeals noted, this Court has made this point about Congress's use of "any" not once or twice but many times.

The Court has repeatedly ruled that the modifier "any" precludes a narrow construction of the modified term.[3] The FCC itself recently urged this Court to interpret the word "any," in a provision of the Telecomunications Act, in just this way. See *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 331-32 (2002) (interpreting 47 U.S.C. 224(a)(4)).

Petitioners rely heavily on *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002). See FCC Br. 11, 15, 20, 23; SW Bell Br. 12-13, 25-27. *Raygor* ruled that claims brought against States and dismissed on grounds of State sovereign immunity did not fall within the phrase "any claim asserted" in the limitations-tolling provision of the supplemental jurisdiction statute, 28 U.S.C. 1367(d). But *Raygor*, and the Court's subsequent treatment of that case, actually refute petitioners' position. Last Term, in *Jinks v. Richland County*, 123 S. Ct. 1667 (2003), the Court considered the same phrase in the same statute. As applied in *Jinks*, Section 1367(d) partially overrode a State's decision to limit its subdivisions' liability to suit in State court under *State* law. *Jinks*, therefore, involved not State sovereign immunity but a claim closely parallel to petitioners' here: a claim that the statute "'interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.'" *Id.* at 1670 (citation omitted).

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[3] See, *e.g.*, *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002); *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 341-42 (2002); *Brogan v. United States*, 522 U.S. 398, 400-01, 405 (1998); *Salinas v. United States*, 522 U.S. 52, 57 (1997); *Freytag v. Commissioner*, 501 U.S. 868, 873-74 (1991); *United States v. James*, 478 U.S. 597, 605 (1986); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980); *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 529 (1947).

In that context—which, unlike *Raygor* but like this case, concerns a State's authority over its subdivisions—the Court unanimously ruled that the logic of *Raygor* did not apply. The Court held that "*any claim* asserted"—the emphasis is the Court's (123 S. Ct. at 1673)—is an inclusive phrase that reaches all claims against municipalities. *Ibid.*[4]

Petitioners insist that Section 253(a) was intended to do no more than "overturn state exclusive-franchise laws" (SW Bell Br. 10; see *id.* at 3, 16, 17; FCC Br. 3, 10, 17). But that is, quite plainly, not what Section 253(a) says. Congress could simply have banned States from providing exclusive franchises, in those terms, if that was all it wished to do.[5] Congress indisputably went beyond that; it prohibited barriers that prevent "any entity" from competing. As a matter of ordinary meaning, the modifier "any" means that the modified phrase is to be interpreted as expansively as language allows; the term "entity" is a notably inclusive term; and the phrase "any entity," if given its plain meaning, unquestionably includes municipalities and municipally-owned utilities. The meaning of Section 253(a) could hardly

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[4] In addition, in *Raygor* there was a genuine ambiguity in the statute, as the Court noted. See 534 U.S. at 544-45. It is entirely plausible to suppose that when Congress extends a statute of limitations for "any claim asserted," it does not mean to include claims that were asserted but were obviously groundless, or claims that were asserted in defective filings—or claims that were asserted in contravention of a constitutional immunity. In *Jinks*, there was no similar basis for limiting the scope of the phrase "any claim asserted"; and here, petitioners have failed to show any basis for limiting the phrase "any entity," which can be interpreted to encompass municipalities and municipal utilities without any tinge of absurdity or implausibility.

[5] Congress has, in fact, done so elsewhere, in the cable franchising provisions of Communications Act, the statute that the Telecommunications Act of 1996 amended. See, *e.g.*, 47 U.S.C. 541(a)(1) (A franchising authority "may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.")

be clearer. In this Court's words: "States may no longer enforce laws that impede competition" (*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 371).

2. Petitioner Southwestern Bell emphasizes that Congress often provides a specific definition of the term "entity" when that word occurs in a statute, and that those definitions sometimes include, and sometimes exclude, political subdivisions. See SW Bell Br. 22-24. These observations, which are accurate, further undercut petitioners' position. The fact that Congress sometimes explicitly defines the word "entity" to include political subdivisions shows that Congress sees no linguistic oddity in that usage. In addition, if Congress sometimes explicitly limits "entity" to public entities and sometimes limits the term to private entities, then when Congress provides *no* limit, the logical inference is, quite simply, that Congress did not intend to limit the term. It meant it to apply to all entities, public and private. Surely there is no basis for inferring, as Southwestern Bell would have it, that Congress deliberately left an ambiguity in the statute.

More generally, the fact that Congress provided no specific definition of "entity" in the Telecommunications Act must be taken to show that Congress wanted the term to be given its ordinary English meaning. See, *e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). If Congress had intended the term "any entity" to have a technical, esoteric meaning, or a contrived definition like the various ones petitioners propose, it would not have left the term undefined. And, as we have said, in its ordinary usage, "entity" includes municipalities and municipally-owned utilities.

C. Not only are municipalities and municipal utilities within the ordinary meaning of the phrase "any entity"; there are powerful reasons to interpret that phrase in Section 253(a)

to include municipalities and municipally-owned utilities that seek to provide telecommunications services. Municipalities and municipally-owned utilities are a singularly important source of competition in telecommunications markets; and Congress knew that when it enacted the Telecommunications Act.

1. The Federal Communications Commission itself provides the most compelling testimony to the competitive importance of removing barriers that would keep municipalities and municipal utilities out of telecommunications markets. In the *Texas Preemption Order*, the Commission went out of its way to "encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in [the Texas statute]." 13 F.C.C.R. at 3549. The Commission explained: "Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." *Ibid.* The Commission rejected the notion that barriers to municipal entry were needed to deal with the issues that Texas had used to justify its statute, such as "issues regarding taxpayer protection" and "questions concerning possible regulatory bias"; the Commission stated that "these issue can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition." *Ibid.*

In the proceedings below, the Commission was even more emphatic in describing the importance of municipalities to telecommunications markets and in rejecting the supposed rationales for the Missouri statute. The Commission made clear that it was declining to preempt the Missouri statute only because it believed that this Court's decisions and the District of Columbia Circuit's decision in *Abilene* required it to do so: "[T]he legal authorities that we must look to in this case compel us to" reach that conclusion, the Commission said, despite the damage done by the Missouri statute. Pet.

App. 23a. The Commission noted that it "has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry." *Ibid.* (citation omitted).

Specifically, the Commission said, "entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a. That is because, the Commission found, "municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services." *Id.* at 24a. The Commission noted a case study it had conducted, in Muscatine, Iowa, where consumers had exceptional access to advanced telecommunications services "due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services." *Ibid.* The Commission further noted that "[m]unicipally-owned utilities also serve large cities, including Los Angeles, Seattle, Cleveland, and San Antonio, and are also potential competitors in these areas." *Id.* at 24a n. 34.[6] The Commission also, as it had in the Texas case, debunked the policy arguments that were offered in defense of the Missouri law: "[I]ssues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor * * * can be dealt with successfully through measures that are much less restrictive than an outright ban on entry" (*id.* at 25a-26a).

In separate statements, three Commissioners—a majority of the Commission—were more emphatic still. Chairman

[6] Further evidence about the importance of municipal entrants to telecommunications markets is provided in the briefs submitted by, respectively, amici curiae Knology, Inc.; High Tech Broadband Coalition and Fiber to the Home Council; Consumers Federation of America; and Educause.

Kennard and Commissioner Tristani noted that they voted "reluctantly" to deny preemption because that result, which "effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri" is "legally required [but] is not the right result for consumers in Missouri." Pet. App. 42a. Eliminating barriers to municipal entry, the Commissioners said, "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." *Id.* at 43a. Commissioner Ness, in a separate statement, emphasized that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas" (*id.* at 44a) and stated that the Commission's decision "does not indicate support for a policy that eliminates competitors from the marketplace." *Id.* at 43a.

The petitioners, including the federal petitioners, conspicuously do not argue that the FCC's decision in this case is entitled to deference under the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Their decision not to invoke *Chevron* is understandable, and proper: The FCC's ruling in this case rested not on an independent determination of the appropriate scope of the phrase "any entity" but rather on the FCC's belief that the decisions of this Court and the District of Columbia Circuit compelled it to deny preemption. The FCC made it entirely clear that, were it not for what the Commission perceived as the mandate of those decisions, it would have preempted the Missouri statute.

In fact, to the extent the doctrine of *Chevron* and similar cases requiring deference to agency determinations rests on the agency's comparative expertise (see, *e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 703 (1995)), those cases dictate that the term

"entity" should be interpreted to extend to municipalities and municipal utilities. On the question of which interpretation of Section 253(a) would best promote competition and best serve the purposes of the Telecommunications Act—the question that implicates the FCC's expertise—the FCC's judgment was unequivocal, and it was unequivocally opposed to the Missouri statute. The FCC left no doubt whatever that, in its expert view, interpreting "any entity" to include municipalities and municipally-owned utilities would best promote competition and best serve the purposes of the 1996 Act. The FCC also left no doubt of its view that the objectives purportedly served by the Missouri statute could be equally well served "through measures that are much less restrictive than an outright ban on entry." Pet. App. 26a. The policies underlying *Chevron* and similar decisions, therefore—like the plain meaning of Section 253(a) and, as we are about to demonstrate, the legislative history—dictate that the Missouri statute should be preempted.

2. When Congress adopted Section 253(a) as part of the 1996 Act, it was well aware of what the FCC later emphasized—that municipalities and municipal utilities are extremely important potential competitors in telecommunications markets. There is incontrovertible evidence that Congress intended to enable utilities to enter, and compete in, telecommunications markets. And the Act itself demonstrates that Congress knew that many utilities are owned or operated by municipalities (something that is common knowledge in any event). Congress differentiated between public and non-public utilities in some provisions of the Act—but Section 253(a) makes no such distinction, and at no point did Congress show any inclination to differentiate among these different kinds of utilities for purposes of removing barriers to entry.

a. The legislative history of the Telecommunications Act could not be more explicit in stating that utilities are among

the "entities" whose right to enter telecommunications markets is protected by Section 253(a). The Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act stated that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." H. R. Rep. 104-230, 104th Cong., 2d Sess. 127 (1996) ("House Report"). The Senate Report that accompanied the provision that became Section 253(a) explained, in its summary of the major features of the bill, that this provision "allows all electric, gas, water, ste[a]m, and other utilities to provide telecommunications" (S. Rep. 103-367, 103d Cong., 2d Sess. 22 (1994) ("Senate Report")).[7] Elsewhere the Senate Report discussed at great length the importance of electric utilities as potential competitors in telecommunications markets. See Senate Report 10-11. See also Senate Report 55: "If an electric utility * * * provides telecommunications services, it will be considered a telecommunications carrier for those services."[8]

Petitioner Southwestern Bell suggests (Br. 18) that perhaps Congress was unaware that municipalities own or operate electric utilities. That claim is implausible on its face: There are over 2000 public power utilities in the United States, located in every state except Hawaii. By way of contrast, there are approximately 200 investor-owned utilities. (There are also 900 rural electric associations.) American Public Power Ass'n, 2003 Annual Directory & Statistical Report 13.

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[7] As we explain below, the provision that became Section 253(a) originated as Section 302 of S. 1822, 103d Cong., 2d Sess. (1994) (adding Section 230(a)). This provision was discussed in the Senate Report. Section 253(a), as enacted, is identical is all relevant respects.

[8] For a more detailed account of the legislative history, see the brief of amici curiae International Municipal Lawyers Association, National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Counties and United States Conference of Mayors.

In any event, the notion that Congress was unaware that municipalities often own utilities is belied by the Act itself. The Telecommunications Act of 1996 amended the Pole Attachments Act, 47 U.S.C. 224, by adding a definition of "utility." 110 Stat. 150; see 47 U.S.C. 224(a)(1) ("[A]ny person who is a local exchange carrier or an electric, gas, water, steam or other public utility * * * "); *National Cable & Telecommunications Ass'n, Inc*, 534 U.S. at 332. But the Telecommunications Act specifically limited the definition of "utility"—"[a]s used in this section"—by excluding "any person owned by * * *any State", or any political subdivision. 47 U.S.C. 224(a)(1).[9] This is unequivocal evidence, in the text of the Act, that Congress was aware that many utilities—whose entry into telecommunications markets was one of the prime objectives of Section 253(a)—were owned by public entities, including municipalities.

In sum, Congress unquestionably intended utilities to be among the "entities" protected by Section 253(a); Congress was well aware, as anyone would be—and its awareness is reflected in the Telecommunications Act itself—that utilities are often owned by municipalities; Congress exempted municipally-owned utilities from one provision of the Act; and Congress did not exempt municipally-owned entities from Section 253(a), instead using the inclusive phrase "any entity." The conclusion is clear that Section 253(a) protects the right of municipalities to enter telecommunications markets.

b. There is a specific legislative history on this issue that places Congress's intentions even further beyond doubt. The provision that became Section 253(a) of the Telecommunications Act of 1996 originated in S. 1822, 103d Cong., 2d Sess. (1994), the proposed Telecommunications Act of 1994. At

[9]The term "State" is defined elsewhere in the Act to include political subdivisions. See 47 U.S.C. 224(a)(3).

the hearings on S. 1822, a witness testified about the contributions that municipal utilities had made, and could make in the future, in providing telecommunications services to communities that were underserved by private sector firms. See *The Communications Act of 1994: Hearings on S. 1822 Before the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 351-60 (1994) ("S. 1822 Hearings").

After that testimony, Senator Lott, a Senate manager of the Telecommunications Act (House Report 110), stated: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." S. 1822 Hearings at 379. The "language" that appeared in S. 1822 was "any entity," in a provision that is identical in all relevant respects to the language of Section 253(a): "no State or local statute or regulation * * * may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." S. 1822, § 302, adding 47 U.S.C. 230(a); see Senate Report 141. That language, interpreted according to its plain meaning, accomplishes the result that was Congress's manifest intention: it prohibits States from barring municipal entry into telecommunications markets.

II. Enforcing Section 253(a) According To Its Plain Meaning Does Not Produce Implausible Results And Does Not Raise Constitutional Questions.

Perhaps aware that the language of Section 253(a) is unequivocal, petitioners offer various arguments designed to show that interpreting the statute according to its plain meaning would lead to results Congress could not have intended. These arguments of petitioners' fall into two categories. First, petitioners suggest that interpreting Section

253(a) according to its plain meaning would produce a variety of obviously absurd results—such as enabling a mayor to provide telecommunications services over the objections of the town council (SW Bell Br. 19), or permitting various special purpose districts or components of the State government to "enter[] the commercial telecommunications business" (Nixon Br. 30). Second, petitioners urge that applying Section 253(a) to municipalities and municipally-owned utilities would work such an extraordinary and unprecedented invasion of state sovereignty that Congress cannot be supposed to have intended to do so. Both of these arguments are demonstrably incorrect.

A. Section 253(a), interpreted according to its plain meaning, does not produce implausible results.

1. Petitioners' first set of assertions—that interpreting "any entity" to mean "any entity" would produce results that are absurd by anyone's lights—is conclusively refuted by Section 253(b), a provision that petitioners fail to mention when they make these arguments. In enacting the 1996 Act, Congress conjoined the unequivocal prohibition of Section 253(a) with Section 253(b)'s explicit preservation of substantial State authority. In that way, Congress ensured that Section 253(a) would not produce results that are absurd, or that constitute an excessive incursion on State sovereignty. Section 253(b) provides:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

By virtue of Section 253(b), a State may—of course—allocate responsibilities among various government officials and agencies without having to authorize each of them to

provide telecommunications services. And a State is free to limit local governments' commercial activities and otherwise to structure local governments in any way it sees fit—subject only to the condition that, if it erects a barrier to entry into the telecommunications market, it must meet the standards of Section 253(b).

There is, accordingly, nothing absurd at all about interpreting Section 253(a) according to its plain meaning. Compare *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978).There is no need for judicial rewriting of the Telecommunications Act to provide needed flexibility: Section 253(b) provides the flexibility that Congress intended. And, contrary to petitioners, there is no basis for regarding Section 253(a)'s reference to "any entity" as being in the least bit ambiguous or equivocal.

2. For the same reasons, petitioners are utterly mistaken in their repeated assertions that Section 253(a), interpreted according to its plain meaning to prohibit barriers to municipal entry, would bring about an "extreme result" (SW Bell Br. 10) by "interfer[ing] with a fundamental aspect of state sovereignty" (FCC Br. 9) and would "strike at the heart of the sovereignty of the States" (SW Bell Br. 15). Section 253(a) is unequivocal in its application to "any entity" but—because of Section 253(b)—appropriately limited in its impact on State sovereignty. Petitioner Southwestern Bell freely acknowledges that Section 253(b) "expressly preserve[s] States' authority under state law to pursue important policies of local concern * * * even if those policies might be inconsistent with section 253(a)." SW Bell Br. 20. Petitioner Southwestern Bell somehow draws the inference that Section 253(a) therefore cannot be interpreted to mean what it says. See SW Bell Br. 11, 20; see also *City of Abilene v. FCC*, 164 F. 3d 49, 53 (D.C. Cir. 1999). But the proper inference is exactly the opposite: the preservation of

State regulatory authority in Section 253(b) establishes that Section 253(a) poses no threat to State sovereignty.

In fact, far from Section 253(a) constituting a substantial incursion on State sovereignty, petitioners and their supporting amici have failed to identify *any* legitimate State interest that Section 253(a) prevents them from pursuing. Petitioners defend the Missouri statute's barrier to entry by invoking abstract ideas of State sovereignty. But the Federal Communications Commission itself explicitly stated in the proceedings below—echoing statements it had made in the Texas case—that any legitimate interests adduced by petitioners in support of the Missouri law could be promoted by State laws that are "much less restrictive than a barrier to entry." Pet. App. 25a-26a. The Commission pointed to Section 253(b), which allows States to address alleged abuses;[10] the Commission also mentioned its own power to preempt any municipal law or regulation that is exclusionary or anticompetitive. See Pet. App. 25a-26a & n. 38. At no point in the proceedings below did the Commission identify a single legitimate interest that is served by the flat exclusionary barrier of the Missouri statute.

B. Section 253(a), interpreted according to its plain meaning, is not an extraordinary incursion on State sovereignty.

Petitioners also assert that Section 253(a), interpreted according to its plain meaning, would constitute such a "serious inroad on an area central to state sovereignty" (FCC Br. 11) that Congress could not have intended it. Indeed,

[10] We do not concede the legitimacy of the concerns asserted by petitioners and their amici; for a refutation of the charges made by petitioner Southwestern Bell and amici Sprint Corp. and USTA, et al., see the brief of amicus curiae Consumers Federation of America. For historical background, see the brief of amicus curiae Lincoln Electric System.

petitioner Nixon argues (Br. 9-25) that Section 253(a) would be unconstitutional if interpreted in that way. These contentions, too, are groundless.

1. It is not an extraordinary thing for Congress to do what it did in Section 253(a): to grant (or deny) local governments certain limited powers, notwithstanding State law to the contrary. This Court has decided several cases in which parties contended that Acts of Congress did exactly that. On at least one such occasion, the Court agreed, and ruled that Congress had granted local governments certain prerogatives that State law could not override. *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985). On other occasions, the Court has interpreted Acts of Congress in a way that resulted in their "interfering in a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18)—but the Court gave no indication that this constituted a troubling affront to State sovereignty.

Even when the Court has rejected a claim that Congress has limited States' power to allocate authority among local governments, the Court has never suggested that it would be unprecedented for Congress to do so, or that the Court would override plain language that indicated that Congress wished to do so. Rather, the Court has used the usual methods of statutory interpretation to determine whether Congress intended to take such a step. The "traditional prerogative of the States to delegate [or withhold] * * * authority to [or from] their constituent parts" (*City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 429 (2002)), has played a role in the analysis; but it is just one factor among many that the Court has considered in interpreting the statute. So far as we are aware, no Member of the Court has ever suggested that a concern with this aspect of State sovereignty could justify disregarding the plain meaning of statutory language, much less that it would be unconstitutional for

Congress to grant limited powers to a local government if a State law were to the contrary.

a. In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempted local governments' regulation of pesticides. A provision of FIFRA specifically stated that "'A State may regulate the sale or use of any federally registered pesticide * * *.'" 7 U.S.C. 136v, quoted in *Mortier*, 501 U.S. at 606 (ellipsis added). The Court addressed the question whether this reference to a State impliedly authorized local governments, as well, to regulate pesticides.

This question is parallel to the issue here. In both *Mortier* and this case, the issue is whether Congress intended to override States' decisions about the powers their subdivisions could exercise. In *Mortier*, the question was whether Congress could override a State's decision to grant powers to its subdivisions; here, the question concerns a State's effort to withhold powers from its subdivisions. But those questions implicate the same State sovereignty concerns.[11] Both involve "[t]he ability of States to define the authority of their own political subdivisions" (Nixon Br. 6) and a potential "interfer[ence] in a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18). Indeed, petitioners rely heavily on both *Mortier* and *City of Columbus v. Ours Garage and Wrecker Service, supra*, which involved the same kind of question as *Mortier*.

[11] In fact, as we explain below, *Mortier* and *City of Columbus v. Ours Garage and Wrecker Service, supra*, implicate State sovereignty much more directly than Section 253(a) does. That is because those cases concerned the States' control over their subdivisions' regulatory powers, not just over the subdivisions' commercial activities. See pages 28-29.

The Court in *Mortier* explained that, in order to establish preemption—that is, in order to conclude that Congress had overridden a State's decision about how to allocate authority among its subdivisions—the following showing would have to be made:

> [I]t would * * * have to be shown *under ordinary canons of construction* that FIFRA's delegation of authority to "State[s]" would not * * * allow the States in turn to redelegate some of this authority to their political subdivisions * * *.

501 U.S. at 612 (first brackets and emphasis added). Consistent with this view, the Court carefully analyzed both the statutory language and the legislative history before concluding that, all things considered, the better interpretation of FIFRA did not preclude States from delegating authority to local governments. The Court never suggested that it would strain to interpret the language to avoid concluding that Congress meant to override the State decision. The Court never remotely suggested that the conclusion that States could not delegate authority would raise constitutional issues or would be such an extraordinary incursion on State sovereignty as to be almost unthinkable. The Court did mention the principle that, traditionally, States determine what powers their subdivisions will exercise (501 U.S. at 607-08). But this was just one factor among many in the Court's analysis.

b. In *City of Columbus, supra*, the Court addressed a similar question. The Interstate Commerce Act preempts both State and local regulation of prices, routes, and services of motor carriers with respect to the transportation of property, 49 U.S.C. 14501(c)(1), but an exception to that preemption provision—49 U.S.C. 14501(c)(2)(A)—specifies that "the safety regulatory authority of a State" is not preempted. The question was whether a State could delegate such regulatory authority to a local government. The Court again analyzed the statute with care, noting indications in the statutory language

pointing in both directions. See 536 U.S. at 434-36. The States' traditional power to decide what powers to delegate to their subdivisions played a role in the Court's analysis, but, again, only in combination with the other indications of legislative intent. See *id* at 432-42.

All the Members of the Court in *City of Columbus* recognized that federal statutes frequently limit States' power over their subdivisions. The majority in *City of Columbus* acknowledged that numerous federal spending programs "explicitly restrict the prerogatives of States to entrust governance of a matter to localities." 536 U.S. at 438. The dissenting opinion agreed, stating that "it should not be thought that the States' power to control the relationship between themselves and their political subdivisions * * * has hitherto been regarded as sacrosanct" (*id.* at 448 (opinion of Scalia, J., joined by O'Connor, J.)) and enumerating "many significant federal programs" that limit the States' power to control the authority that subdivisions may exercise. See *id.* at 448-49. Again there was no hint of a suggestion, by any Justice, that the interpretation supported by the dissent would create a constitutional question.

The issue in *Mortier* and *City of Columbus*—whether Congress had limited the States' power to delegate regulatory authority to its subdivisions—in fact implicated State sovereignty far more directly than does any issue presented by Section 253(a). In *Mortier* and *City of Columbus*, the claim was that Congress had deprived a State of the power to allocate regulatory authority as it saw fit. By contrast, Section 253(a) concerns not a State's power to delegate regulatory authority but rather only limitations on commercial activity by political subdivisions. See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991).

Regulatory authority is the defining feature of government; it is precisely the power that distinguishes the government from a private entity. An Act of Congress that "interfer[es] in

a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18) implicates State sovereignty to a far more significant degree when State regulatory authority is at stake—as it was in *Mortier* and *City of Columbus*—than when, as here, the State is not allocating its regulatory authority but only controlling the commercial activity of its subdivisions. Nonetheless, the Court in *Mortier* and *City of Columbus* did not suggest that the possibility of a Congressional "interference" with the State's authority would justify overriding the plain meaning of a statute, or even that any ambiguity would automatically be resolved in a way that preserved the State's authority. The Court used "ordinary canons of [statutory] construction" (*Mortier*, 501 U.S. 612), in both cases, considering State sovereignty as just one among several factors that shed light on the proper interpretation of the federal statute. It follows *a fortiori* that this case should also be resolved according to "ordinary canons of statutory construction."

c. In *Lawrence County v. Lead-Deadwood School District, supra*, the Court held that an Act of Congress—one that the Court did not find to be clear on its face—did empower local governments to disregard a State statute that restricted their authority. The Payment in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, provides for payments to local governments and specifies that the local government "may use the payment for any governmental purpose." 31 U.S.C. 6902(a). A South Dakota statute specified how the funds received by localities were to be spent. See 469 U.S. at 259. The Court held that the State statute was preempted. *Id.* at 258.

The Act of Congress involved in *Lawrence County* was not clear on its face. As a matter of plain language, the provision that a local government "may use the payment for any governmental purpose" certainly could be interpreted to limit the local government to purposes that State law authorizes. Indeed, the Court in *Lawrence County* acknowledged as

much. See 469 U.S. at 261 ("At the very least, [the provision] is ambiguous with respect to the degree of discretion it confers on local governments."). After examining the background, the legislative history, and other provisions of the Act, the Court concluded, on balance, that Congress intended to preserve local autonomy against State law. See *id.* at 261-70.

Lawrence County disposes of any suggestion that federalism concerns compel the Court to interpret "any entity" in Section 253(a) to exclude municipalities and municipally-owned utilities. Section 253(a), unlike the statute at issue in *Lawrence County*, is not the least bit ambiguous. Nothing in the language or legislative history of the Telecommunications Act suggests that Congress meant to exclude municipalities and municipally-owned utilities from the protection of Section 253(a). There is no reason to believe that the incursion on State sovereignty in this case is more significant than in *Lawrence County*. There is, accordingly, simply no basis for the Court to read an exclusion into Section 253(a).[12]

d. In other areas as well, the Court has interpreted Acts of Congress to affect "the ability of States to define the authority of their own political subdivisions" (Nixon Br. 6). In many of

[12] As the Court has pointed out (see *City of Columbus*, 536 U.S. at 438), *Lawrence County* involved a federal grant program, enacted under the Spending Clause; the Telecommunications Act was enacted under the authority of the Commerce Clause. But this does not provide a reason for the Court to rewrite the language of Section 253(a). In fact, under the doctrine of *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981), restrictions that Spending Clause legislation imposes on the States are to be interpreted especially strictly. That is, the Court should be especially reluctant to resolve ambiguity in Spending Clause legislation in a way that contravenes State interests. *Ibid.* The Court in *Lawrence County* did so. There is, accordingly, no reason to read an exception into the unambiguous language of non-Spending Clause legislation like Section 253(a).

these areas, the governing principles are very well established, and there has never been any suggestion that these principles constitute objectionable or extraordinary inroads on State sovereignty.

For example, as we have mentioned, while a State is protected from suits under federal law by a constitutionally-based sovereign immunity, municipalities do not share that immunity. See, *e.g.*, *Alden*, 527 U.S. at 756. The result of this limitation is that States are significantly constrained in how they allocate powers. If a State wishes a power to be exercised free of the risk of liability, it must retain the power in "an arm of the State" (*Mt. Healthy City School District*, 429 U.S. at 280); it cannot delegate that power to a political subdivision. See, *e.g.*, *id.* at 280-81. The Court has characterized this as an "important limit" on State sovereign immunity (*Alden*, 527 U.S. at 756) and has never suggested that the resulting "interfer[ence] in a State's internal allocation of authority" (FCC Br. 18) is somehow problematic.

Moreover, as we have noted, Congress has even restricted the power of a State to define the immunity of its subdivisions from a suit based on *State* law, in State court. *Jinks v. Richland County*, *supra*. In *Jinks*, a unanimous Court flatly rejected the contention that the Act of Congress imposing this restriction should be subject to a clear statement rule because it constituted "an encroachment on 'state sovereignty.'" 123 S. Ct. at 1673. The Court also denied that any constitutional question was raised by that federal limitation on a State's capacity to protect its subdivisions from liability under State law. *Ibid.* If Congress may, without raising any significant constitutional issues and without even making a "clear statement," subject State subdivisions to liability under State law—notwithstanding the contrary dictates of State immunity principles—then it is difficult to see why Section 253(a) should raise substantial concerns.

The antitrust laws impose a similar limitation on States' authority to allocate power among their subdivisions. As we have noted, anti-competitive measures enacted by the States do not give rise to liability under the Sherman Antitrust Act. *Parker v. Brown*, 317 U.S. 341 (1943). But a State may not simply delegate the power to enact such measures to political subdivisions. See, *e.g.*, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). A State may delegate this power only in the way specified by federal law—by establishing a "clearly articulated and affirmatively expressed state policy" to supersede competition. See *id.* at 52; *Hallie v. City of Eau Claire*, 471 U.S. 34, 40-41 (1985). This limitation on "[t]he ability of States to define the authority of their own political subdivisions" (Nixon Br. 6) also has never been thought to require resort to special rules of statutory interpretation.

2. Petitioners rely extensively in this Court's statements in cases such as *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), to the effect that the powers of municipalities "rest[] in the absolute discretion of the State." *Id.* at 178. See, *e.g.*, Nixon Br. 12, 14, 16; FCC Br. 14. But *Hunter* and the cases that make similar statements involved claims that various constitutional provisions gave municipalities, or their officials, rights against the States. None of those cases dealt with an Act of Congress that limited State authority over municipalities.[13] In fact, the Court's opinion in *Sailors v. Board of Education, supra*, which petitioners repeatedly cite for the proposition that States have plenary power over their subdivisions, went out of its way to say—twice—that a State may not use that power in a way that "defeat[s] a federally

[13] See, *e.g.*, *Hunter*, 207 U.S. at 176-77 (Contract and Due Process Clauses of the Constitution); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (Contract, Due Process, and Just Compensation Clauses); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 629-30 (1819) (Contract Clause).

protected right" or "runs afoul of a federally protected right" (387 U.S. at 108, 109). Here, as we have shown, Congress has created such a right, in plain terms.

C. Interpreting Section 253(a) to preempt the Missouri statute raises no substantial constitutional questions.

Petitioner Nixon and petitioner Southwestern Bell nonetheless assert that Section 253(a) would be unconstitutional if it were interpreted, in accordance with its plain meaning, to prohibit States from establishing barriers to municipal entry. See SW Bell Br. 15 n.10; Nixon Br. 9-25. This argument has no foundation whatever. It certainly may be the case that some extreme federal intrusions into a State's decision about how to organize its internal affairs would violate the Constitution. See, *e.g.*, *Coyle v. Oklahoma*, 221 U.S. 559 (1911). But as we have said, Section 253(a) imposes only the most limited, and reasonable, restriction on State authority. In the cases we discussed that involved similar or more significant limitations, not a single Justice—on either side of the question of how the statute should be interpreted—suggested that it would be unconstitutional for Congress to limit State power in this way. Nor are we aware of any such suggestion in any other case.

Petitioner Southwestern Bell and petitioner Nixon suggest that Section 253(a) "'commandeer[s]'" State governments (SW Bell Br. 15 n.10; citation omitted) in violation of this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). See also Nixon Br. 23-25. But Section 253(a) does not commandeer any State because it does not compel any State to *do* anything. It requires the States only to *refrain* from enacting anti-competitive barriers to entry.

Southwestern Bell boldly asserts that Section 253(a) constitutes commandeering because, by preventing States

from erecting barriers to entry, Section 253(a) "effectively conscript[s] the governments of the States into assisting with Congress's plan to inject competition into local telecommunications markets." SW Bell Br. 15 n.10. If forbidding a State to interfere with an otherwise constitutional federal program constitutes "commandeering," then—by Southwestern Bell's logic—no Act of Congress could ever preempt any State law.

D. Interpreting Section 253(a) not to apply to municipalities would create anomalies.

It is petitioners' interpretation of Section 253(a)—not the Eighth Circuit's—that would create anomalies. Petitioners would import into Section 253(a) a distinction between entities that are "political subdivisions" of States and those that are not. But it is far from apparent how this distinction—reflecting, as it does, nothing in the language of the statute—is to be drawn.

Municipalities can be involved in provision of telecommunications services in wide variety of ways. Some municipalities provide such services themselves through a department or agency. Others establish and own a separate utility and control it directly through, for example, a city council. In other instances, municipal officials do not control the utility directly but appoint the governing board. In still other cases, the city has created an entity whose board is composed of independently elected members. Or a utility might be governed by some combination of these arrangements, in which certain corporate decisions are made by municipal officials and others by an independent board. Telecommunications services might also be provided by a joint venture between a municipal utility and a private firm—a joint venture that itself might take a variety of forms. Or a municipality might create and own a non-profit corporation or invest in a private firm and thereby exercise a degree of control over its operations.

Under petitioners' approach, the Federal Communications Commission would be forced to decide which of these business models constituted a "political subdivision" and which is instead an "entity." In this case, the FCC declared that the crucial question was whether the service provider "has an independent corporate identity" (Pet. App. 23a) or—what the Commission apparently considered the same thing—"a separate juridical personality" (*id.* at 35a). But these notions, too, are hardly self-defining and, like the term "political subdivision," occur nowhere in the Act. As a result, the FCC undertook a detailed examination of Missouri law to determine that the utilities in this case did not meet its standard. See *id.* at 32a-34a.

This approach—which petitioners' view would compel the FCC to take—is anomalous in at least two respects. First, it makes the determination of what constitutes an "entity" dependent on the particular features of State law, a result that Congress could not have intended. Section 253(a) is a limit on State power. It is highly unlikely that Congress, having made a considered determination to prevent States from barring "any entity" from telecommunications markets, would then permit States to determine the scope of their own power by incorporating State law definitions of what constitutes an "entity."

Second, and perhaps more important, it is anomalous for the Federal Communications Commission to be making these determinations of what constitutes a "political subdivision" or a "separate juridical personality"—as opposed to the determination we believe the Commission should make, which is whether a State regulation is "competitively neutral" and otherwise complies with Section 253(b). The Commission has no special expertise in local government law. The Commission is, however, expert in matters concerning competition in telecommunications markets.

The point, of course, is not that distinctions between governmental and private institutions are impossible to draw. Rather the question is one of how Congress intended Section 253(a) to be construed. There is no reason at all to believe that Congress, when it directed the FCC to preempt State laws that violate Section 253, envisioned that the Commission would make fine-grained decisions about whether an entity is a "separate juridical personality," as petitioners would require. It is far more plausible to suppose that Congress intended Section 253(a) to apply to all entities, whether or not they were "political subdivisions," and intended the Commission to determine, under Section 253(b), whether measures restricting entry were competitively neutral and otherwise in compliance with Section 253(b).

III. The Principle Of *Gregory v. Ashcroft* Does Not Require The Court To Disregard The Plain Meaning Of Section 253(a).

Finally, petitioners assert that, under the principle of *Gregory v. Ashcroft*, *supra*, the Court may not interpret Section 253(a) according to its plain meaning but should instead insist on a more explicit statement—specifically, a more explicit statement of Congress's intention to prohibit State laws that prevent municipalities and municipal utilities from entering telecommunications markets. This contention is wrong for a number of reasons.

First, the presumption of *Gregory v. Ashcroft* applies only when a statute is ambiguous. The Court established this point unequivocally in *Salinas v. United States*, 522 U.S. 52, 60 (1997) (the principle of *Gregory* does "not apply when a statute [i]s unambiguous"); it is, in any event, clear from *Gregory* itself. Section 253(a) is not ambiguous. Second, even when the *Gregory* presumption does apply, it does not automatically require that every ambiguity be resolved by limiting the scope of the Act of Congress. As we have explained, in a number of cases the Court has made clear that

the effect of federal legislation on the internal allocation of power within a State is a factor to be considered in determining the proper interpretation of an ambiguous statute but is not necessarily decisive.

At bottom, petitioners' claim—although they do not fully avow it—is that the prohibition contained in Section 253(a) cannot apply to municipalities and municipally-owned utilities unless Congress explicitly refers to municipalities in the text of the statute. The Court has never imposed that kind of rigid rule on Congress—even in cases dealing with State sovereign immunity, where federalism concerns are arguably at the highest level. And the Court has repeatedly *rejected* the notion that *Gregory v. Ashcroft* requires such an approach.

A. 1. As we have demonstrated, Section 253(a), interpreted according to the ordinary methods of statutory construction, is simply not ambiguous. The word "entity," in ordinary usage, includes municipalities and municipally-owned utilities; the phrase "any entity" is the one that Congress would naturally choose if it intended to be as inclusive as possible; in light of the other parts of Section 253, there is no reason not to give Section 253(a) its ordinary meaning; and other provisions of the Telecommunications Act, as well as the legislative history and the statements of the Commission, all reinforce the conclusion that "any entity" should interpreted to reach municipalities and municipally-owned utilities.

Because Section 253(a) is unambiguous, the presumption of *Gregory v. Ashcroft* should play no role in this case. "*Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous." *Salinas*, 522 U.S. at 60; see *Gregory*, 501 U.S. at 470 ("[T]he plain statement rule we apply today * * * [is] to be applied where statutory intent is ambiguous."). Petitioners suggest that Section 253(a) is ambiguous because, according to them, it does not say with absolute explicitness that municipalities and municipally-owned utilities are included in the category

"any entity." See SW Bell Br. 18-20; Nixon Br. 28-29; FCC Br. 20-21. But as the Court ruled in *Salinas*, statutory language does not become ambiguous just because it does not anticipate, and put beyond all doubt, every question that might arise. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60. And, as we explain below, petitioners are wholly misguided in their notion that Section 253(a) cannot apply to a municipality because it does not use that word explicitly.

2. Even if Section 253(a) were ambiguous, *Gregory v. Ashcroft* would not entitle petitioners to prevail. *Gregory v. Ashcroft* does not require that an ambiguity automatically be resolved against Congress's effort to empower local governments. Certainly that is true in a case of this kind, where, as we have explained, the incursion on State sovereignty—especially in view of Section 253(b)'s preservation of State authority—is limited. Rather, the *Gregory* presumption is just one element to be weighed in the balance in determining Congress's intent. The Court's approach to the cases that presented issues similar to this one—*Lawrence County*, *Mortier*, and *City of Columbus*—establishes this.

If petitioners' interpretation of *Gregory v. Ashcroft* were correct, then each of those cases would have been very easy for the Court to resolve—and *Lawrence County* would have come out the other way. In each of those cases, the text of the statute was not unambiguous; in *Lawrence County*, the Court explicitly recognized that it was not. If *Gregory* automatically required that ambiguities be resolved in favor of protecting the State's sovereign interests, then the Court had no need to inquire so carefully into all the indicia of legislative intent, as it did in each of those cases.

This point is particularly clear in *City of Columbus*, which was decided after *Gregory*. The Court in that case, after

acknowledging that the language of the statute presented a close question, proceeded to analyze the statutory language and structure, using—as the Court had said in *Mortier* (501 U.S. 612)— "ordinary canons of [statutory] construction." See *City of Columbus*, 536 U.S. at 433-36. In fact, the Court in *City of Columbus* did not rely on *Gregory*. Federalism concerns did play a role in *City of Columbus*, but they were not in themselves dispositive; the Court treated those concerns, in common sense fashion, as indications of Congress's intent, to be considered along with other such indications. If petitioners' view of *Gregory* were correct, the Court in *City of Columbus* need only have noted the ambiguity of the statute and then immediately proceeded to the conclusion. That is not at all how the Court viewed the case.

B. At bottom, petitioners' error is their view that Section 253(a) cannot apply to municipalities because Congress does not explicitly mention municipalities in that provision. Petitioners never quite acknowledge that this is what they are demanding.[14] But time and again, petitioners' strategy for trying to show "ambiguity" in Section 253(a) is to say that Congress could have defined "entity" explicitly to include political subdivisions. See, *e.g.*, SW Bell Br. 11, 22-23, 24; FCC Br. 23-24. And petitioners never explain what, in their view, could possibly satisfy *Gregory v. Ashcroft*, except such an explicit definition.

But this Court has never required that degree of extreme explicitness, even in the context of State sovereign immunity, where, under the Court's decisions, constitutional concerns

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[14] In fact, the federal petitioners disavow this approach (FCC Br. 15), although in the end their position is difficult to distinguish from what they disavow. See, *e.g.*, FCC Br. 9 ("Section 253(a) cannot be construed to [apply to municipal entities] unless it can be concluded with certainty that Congress so intended.").

and matters of federalism are most directly implicated. See, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring), cited in *Gregory*, 501 U.S. at 467. And the Court has, time after time, rejected the proposition that *Gregory* requires that kind of explicitness. As we have noted, *City of Columbus*, *Mortier*, and *Lawrence County* implicitly reject any such reading of *Gregory*. But beyond that, the Court has explicitly rejected such a reading of *Gregory* in *Salinas v. United States*, *supra*, and in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998); indeed, *Gregory* itself is inconsistent with petitioners' view.

1. *Salinas* is, as the court of appeals noted, a close parallel to this case. In *Salinas* the federal government prosecuted a county official under 18 U.S.C. 666, a bribery statute that applies to agents of local governments that receive federal funds. The statute makes it a crime to accept a bribe "in connection with any business, transaction, or series of transactions of such * * * government" (18 U.S.C. 666(a)(1)(B)). The question was whether the statute reached bribes that did not affect federal funds.

The Court, emphasizing Congress's use of the word "any" in Section 666(a)(1)(B), held that "the prohibition is not confined to a business or transaction which affects federal funds." 522 U.S. at 57. Petitioners in this case assert that Section 253(a) could have specifically said that "any entity" includes municipalities and municipally-owned utilities. But the same could have been said in *Salinas*. Section 666(a)(1)(B) could have said, explicitly, that the prohibition extends to any transaction "whether or not it affects federal funds." The Court flatly rejected the demand for that kind of explicitness in *Salinas*. Petitioners' analogous demand should be rejected here.

Petitioners try to distinguish *Salinas* in two ways. First, they assert, the Court in *Salinas* looked at more than the text

of the statute; it considered the background and apparent purposes of the statute as well. See Nixon Br. 31-32; FCC Br. 21-22; SW Bell Br. 26-27. But what the Court said in *Salinas* was: "The *text* of § 666(a)(1)(B) is unambiguous on the point under consideration here" (522 U.S. at 60; emphasis added). Accordingly, the Court said, *Gregory* "does not warrant a departure from the statute's terms." *Ibid.* In any event, as we explained, more than the text of Section 253(a) supports the conclusion that "any entity" includes municipal entities: other statutory provisions, the legislative history, and the findings of the FCC all reinforce that conclusion.

Second, petitioners assert that the statute at issue in *Salinas* posed less of a threat to the State's sovereign interests than does Section 253(a). See SW Bell Br. 27; FCC Br. 22; Nixon Br. 31. Again, this Court did not view *Salinas* that way. The reason the Court gave for declining to apply the *Gregory* presumption was that the statute was unambiguous. The *Salinas* Court never distinguished *Gregory* on the ground that State interests were implicated to a lesser degree in *Salinas*. Nor were they: in *United States v. Bass*, 404 U.S. 336, 349 (1971), the Court held that "a significant change in the sensitive relation between federal and state criminal jurisdiction" would warrant the application of a plain statement approach.

2. *Yeskey* makes it even clearer, if that is possible, that petitioners are wrong to suggest that Section 253(a) cannot be interpreted to reach municipalities unless Congress mentions them explicitly. The question in *Yeskey* was whether Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, covers state prison inmates. The ADA prohibited discrimination by any "public entity" and defined "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12132; 12131(1)(B).

The question in *Yeskey* was whether prisons fell within the definition of "public entity." The Court assumed that the *Gregory* "plain-statement rule" applied to this question, because "control over the management of state prisons, like establishing the qualifications of state officials, is a traditional and essential state function" (524 U.S. at 209). "'It is difficult to imagine an activity in which a State has a stronger interest.'" *Ibid.*, quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973).

Having made this assumption, the Court in *Yeskey* unanimously held that the *Gregory* rule "is amply met" because "the statute's language unmistakably includes State prisons and prisoners within its coverage." 524 U.S. at 209. That is, even though the definition of "public entity" in the ADA did not specifically refer to prisons, *Gregory* was satisfied because prisons are within the ordinary meaning of the terms used in the statutory definition. 524 U.S. at 210.

The federal petitioners' effort to distinguish *Yeskey* is manifestly unsuccessful. According to the federal petitioners, "the terms of the ADA made clear that the statute was specifically intended to govern state governments in their relations to private parties" (FCC Br. 20), whereas "Section 253(a) does not provide any indication that Congress specifically considered and intended to authorize any special intrusion on state sovereignty" (FCC Br. 21). But Section 253(a) certainly did "ma[k]e clear that the statute was specifically intended to govern state governments" insofar as entry into telecommunications markets was concerned. And, by the same token, the ADA did not show that Congress "specifically considered and intended to authorize any * * * intrusion on" the State role in managing prisons. Petitioners' claim simply cannot survive *Yeskey*.

3. In fact, as *Yeskey* explained (see 524 U.S. at 209), *Gregory* itself decisively refutes petitioners' position. The Court held in *Gregory* that the Age Discrimination in

Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, did not preempt a State constitutional provision that specified a mandatory retirement age for state judges. As the Court said in *Yeskey*:

> [I]n *Gregory* * * * although the ADEA plainly covered state employees, it contained an exception for "appointee[s] on the policymaking level" which made it impossible for us to "conclude that the statute plainly cover[ed] appointed state judges." Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.

524 U.S. at 209 (citation and internal quotation marks omitted; emphasis in original).

In other words, in *Gregory*, the Court had no difficulty in considering judges to be "state employees"—even though, as a matter of ordinary usage, that is, if anything, more questionable than describing municipalities and municipal utilities as "entities." *Gregory* applied its presumption not to the relatively clear term "employees" but to the plainly ambiguous phrase "appointees on the policymaking level." Nothing in Section 253(a) is remotely as ambiguous as that phrase.

This case is like *Yeskey* and not like *Gregory*; indeed it follows *a fortiori* from *Yeskey*. It is implausible to suppose that the incursion on State sovereignty in this case approaches that involved in *Yeskey*; one could hardly say about State regulation of municipal entry into telecommunications markets that "'[i]t is difficult to imagine an activity in which a State has a stronger interest.'" *Yeskey*, 524 U.S. at 209, quoting *Preiser*, 411 U.S. at 491. Section 253(a), like the ADA in *Yeskey*, contains an unambiguous phrase—"any entity"—that, given its ordinary meaning, includes municipalities and municipal utilities. Like *Yeskey*, and unlike *Gregory*, Section 253(a) is "*without* any exception" (*Yeskey*, 524 U.S. at 209; emphasis in original). It is true that there is no explicit

mention of municipalities in Section 253(a) itself—but there was no explicit mention of prisons in *Yeskey*. And unlike in *Yeskey*—where the Court made no mention of the structure of the statute or the legislative history—there is abundant evidence in the structure of the Telecommunications Act and the legislative history that Congress intended Section 253(a) to extend to municipalities and municipally-owned utilities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

SOUTHWESTERN BELL TELEPHONE, L.P., PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

No. 02-1238

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

No. 02-1386

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

No. 02-1405

SOUTHWESTERN BELL TELEPHONE, L.P., PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

The statute at issue in this case—47 U.S.C. 253(a)—should not be construed to preempt state laws allocating or denying authority to the political subdivisions of States. Such preemption would constitute a serious intrusion on state sovereignty, because it would dictate to States how and whether they are to allocate governmental authority among themselves and their political subdivisions. Accordingly, under the rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), Section 253(a)

may not be construed to have that effect unless it can be clearly shown that Congress considered and intended it to do so. Although Section 253(a) was clearly designed to ensure that the telecommunications market would be open, there is nothing in the language, structure, or context of Section 253(a) to indicate that Congress specifically considered and intended the intrusion on state sovereignty that would follow if Section 253(a) were applied to state laws allocating or denying authority to political subdivisions. The court of appeals therefore erred in holding that Section 253(a) preempts state laws prohibiting political subdivisions from providing telecommunications service.

A. The Rule Of *Gregory* v. *Ashcroft* Applies In This Case Because Respondents' Reading Of Section 253(a) Would Seriously Intrude On Core Attributes Of State Sovereignty

Respondents appear to argue that the *Gregory* rule should be weakened or does not apply at all in this case. They argue that Section 253(a), if construed to preempt state laws allocating or refusing to allocate authority to a State's political subdivisions, would not be "an extraordinary incursion on State sovereignty." Resp. Br. 24. That contention is wrong.

1. As the government's opening brief explained (at 12 & n.2), the lower courts, which have divided on the question presented in this case, have uniformly concluded that that question is governed by the rule of *Gregory* v. *Ashcroft*. Indeed, although respondents assert that the Eighth Circuit in this case merely "*assumed* that [the *Gregory*] 'plain statement' standard applied to Section 253(a)," Resp. Br. 4 (emphasis added), the Eighth Circuit in fact clearly *held* that it applied. See Pet. App. 6a (stating that "[a] second plain-

language standard also applies in this case" and citing *Gregory*), 7a ("[T]he *Gregory* rule requires us to determine whether the statutory language plainly requires preemption."). The basis of that holding was that this Court "requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states." *Id.* at 6a. In that respect, the Eighth Circuit, along with each of the other courts that have addressed the issue, was correct. Respondents' effort to avoid the reach of *Gregory* is mistaken.

The *Gregory* rule applies when federal law affects "the structure of * * * government" of a State, because it is "[t]hrough the structure of its government [that] a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460, 462. An important part of a State's "structure of government" consists in the State's determination of which activities should be undertaken by the central state government or its agencies, which activities should be undertaken by the State's political subdivisions, and which activities should not be undertaken by government at all, at any level. States have "absolute discretion" in entrusting—or not entrusting—governmental powers to their political subdivisions, and "[w]hether and how to use that discretion is a question central to state self-government." *City of Columbus* v. *Ours Garage & Wrecker Service*, 536 U.S. 424, 437 (2002). Under respondents' construction of Section 253(a), the statute would limit a State's ability to make those central determinations with respect to one type of activity—the provision of telecommunications service. Section 253(a) cannot be construed to have that effect unless Congress's intent to intrude upon the State's sovereignty in that way is clear.

2. Respondents argue (Br. 28) that Section 253(a) does not directly implicate state sovereignty because it has to do not with a "State's power to delegate regulatory authority to its subdivisions," but with a State's "limitations on commercial activity by political subdivisions." Respondents' distinction is unsound.

The ways in which the citizens of a State authorize governmental commercial activity may express fundamental beliefs about self-government. The citizens of one State may believe that the state government and its subdivisions should leave commercial activities entirely to private business, because government participation in commercial activities may be unnecessarily costly, a deterrent to private entry into the marketplace, or a dangerous role for the government of a free people. The citizens of another State may believe, to the contrary, that state government and its subdivisions should participate in a wide variety of commercial activities to spur competition, ensure services in underserved markets, or conduct commerce with uniquely public concerns in mind. Other States may adopt views between those extremes. But whatever its views on the subject, a State's determination of the appropriate role of government in commercial activities may reflect deep-seated views about the proper role of government in society. Construing a federal law to dictate a State's determinations in this area may therefore intrude deeply into decisions that are fundamental to state sovereignty. Before the federal law may be so interpreted, it must satisfy the *Gregory* rule.

3. On a related point, respondents observe that the FCC determined that "the objectives purportedly served by the Missouri statute could be equally well served through measures that are much less restrictive than an outright ban on entry" by political subdivisions

into the telecommunications market. Resp. Br. 18 (internal quotation marks omitted). Contrary to respondents' contention, however, that does not lessen the extent to which Section 253(a) would intrude on state sovereignty if interpreted as respondents desire. The FCC did state its view that States could take measures short of an outright ban to protect taxpayers from the commercial risks of the telecommunications business and the possible regulatory bias that could result if political subdivisions act as both regulators of and participants in the telecommunications market. See Pet. App. 25a-26a. But States may disagree with the FCC's analysis, and such disagreement may reflect an important judgment made by the affected State. Equally significant, even if the fiscal risks and regulatory pitfalls that attend government involvement in the telecommunications market had simple solutions, a State's fundamental decision that such commercial activity is—or is not —an appropriate role for government in a free society is itself a fundamental sovereign decision. The *Gregory* rule recognizes that Congress "does not readily interfere" with such decisions. *Gregory*, 501 U.S. at 461. Courts accordingly may not construe federal statutes to have that intrusive effect absent a clear showing that Congress considered and intended that result.[1]

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[1] Respondents are correct (Br. 17) that the FCC has not argued that its construction of Section 253(a) is entitled to deference in this case under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). *Chevron* applies only where, after applying "traditional tools of statutory construction," a court cannot "ascertain[] that Congress had an intention on the precise question at issue." See *id.* at 843 n.9. Here, the *Gregory* rule establishes that Section 253(a) does not preempt state laws prohibiting political subdivisions from providing telecommunications service. That eliminates the occasion

B. The *Gregory* Rule Requires That Ambiguities Be Resolved Against Construing Statutes To Intrude On State Sovereignty

Respondents argue that, "even when the *Gregory* presumption does apply, it does not automatically require that every ambiguity be resolved by limiting the scope of an Act of Congress." Resp. Br. 36. That contention is impossible to square with this Court's statement of the rule in *Gregory* itself: "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law in an area central to state sovereignty. *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985)). In any event, none of the cases cited by respondents support their theory that the *Gregory* rule has some weaker force in cases involving a State's allocation of authority to political subdivisions.

1. In two of the cases respondents cite, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991), and *City of Columbus* v. *Ours Garage & Wrecker Service*, *supra*, the Court held that Congress did *not* intend to restrict the authority of local governments when it enacted the federal statutes at issue. Congressional action that does not preempt state or local law poses no threat to state sovereignty. The decisions in those cases accordingly do not support respondents' position that courts may freely construe federal statutes to intrude on state allocations of authority to their political subdivisions.

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for applying *Chevron*. Cf. *National Fed'n of Fed. Employees* v. *Department of the Interior*, 526 U.S. 86, 100 (1999) ("[T]he [agency] should have the opportunity to consider these questions aware that the Statute permits, but does not compel, the conclusions it reached.").

In any event, neither *Mortier* nor *City of Columbus* presented a question analogous to the question presented in this case. In *Mortier*, a federal statute expressly provided that States could regulate pesticides in ways that did not conflict with federal law. 501 U.S. at 606. The question presented was whether that "express grant of regulatory authority to the States," *id.* at 607, impliedly preempted all local laws regulating pesticides. The rule announced in *Gregory* v. *Ashcroft* has no obvious application in the context of an "express grant of regulatory authority" to the States. Moreover, regardless of how the Court answered the question in *Mortier*, a state law analogous to the one in this case—a state law prohibiting localities from regulating pesticides—would continue to have full effect; there was no claim in *Mortier* that the federal statute granted localities authority they would not otherwise have had under state law. *Mortier* is accordingly not on point.

In *City of Columbus*, a federal statute generally preempted certain state or local regulation of motor carriers, but the statute specifically provided that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 536 U.S. at 428 (quoting 49 U.S.C. 14501(c)(2)(A)). The question presented was whether that proviso saved the authority of political subdivisions, as well as States, to regulate motor vehicles, and the Court concluded that it does. The Court's statement of the governing rule clearly supports the government's position—not that of respondents—in this case: "*Absent a clear statement to the contrary*, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their

authority to their constituent parts." *Id.* at 429 (emphasis added).[2]

2. Respondents also err in relying on *Lawrence County* v. *Lead-Deadwood School District*, 469 U.S. 256 (1985). See Resp. Br. 29- 30. In that case, a federal statute provided that local governments "may use [certain federal payments] for any governmental purpose." See 469 U.S. at 258. The federal statute was Spending Clause legislation, see *id.* at 269-270, and the Court held that a state law that expressly purported to dictate how localities must spend federal funds was preempted. As the Court explained, "pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Ibid.* The imposition of such conditions on the expenditure of federal funds is a far cry from the type of intrusion into state sovereignty at issue in this case. Indeed, the *Lawrence County* Court highlighted that distinction, emphasizing that it was not faced with a direct intrusion into areas of core state concern. "The Federal Government has not presumed to dictate manner in which counties may spend *state* in-lieu-of-tax payments." *Id.* at 269.

Although the Court thus held that the State's effort specifically to control the spending of the federal funds

[2] Even if the Court had decided *City of Columbus* differently and held local law preempted, it would still fail to provide support for respondents' position here. In *City of Columbus*, as in *Mortier*, there can be little doubt that a state law analogous to the one here—a state law restricting municipalities from regulating motor vehicles—would have remained valid regardless of how the Court construed the scope of the federal preemption in *City of Columbus*. There was no claim in *City of Columbus* that the federal statute gave localities authority denied to them under state law.

was invalid, nothing in the opinion suggested that state laws prohibiting localities from engaging in specified activities would be invalid, and nothing in the Court's opinion suggests that the federal statute would have authorized localities to spend the funds for purposes that the State might forbid entirely. To the contrary, by providing that local governments may spend the federal funds "for any governmental purpose," the statute suggests strongly that state laws restricting the "governmental purposes" that local governments may pursue—*e.g.*, laws prohibiting localities from entering a particular commercial market—would continue to have effect, even under the federal statute.

3. Finally, respondents cite cases holding that, notwithstanding state laws that grant their subdivisions sovereign immunity, federal law may, without a clear statement, subject those subdivisions to suit. Resp. Br. 31. For example, respondents cite *Jinks* v. *Richland County*, 123 S. Ct. 1667 (2003), which held that a provision of the federal supplemental jurisdiction statute, 28 U.S.C. 1367(d), tolls a state statute of limitations for suits against municipalities in certain circumstances.

Jinks and the other cases cited by respondents are inapposite. As the Court explained in *Jinks*, "a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress" so long as Congress acts "pursuant to a valid exercise of its enumerated powers." 123 S. Ct. at 1673. That rule is "merely the consequence of those cases * * * which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." *Ibid.*; see, *e.g.*, *Monell* v. *Department of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978); *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). No "unmistakably clear" statement

of Congress's intent to subject the locality to suit is necessary, because subjecting municipalities to suit does not threaten any essential element of state sovereignty. *Jinks*, 123 S. Ct. at 1673.

Jinks provides no support for respondents, because this case has nothing to do with Eleventh Amendment sovereign immunity or with subjecting municipalities to suit. The holding of *Jinks* and the cases that preceded it is that, once a State has created political subdivisions, Congress's decision to provide for suits against those subdivisions under certain circumstances does not intrude on state sovereignty. But construction of a federal statute such as Section 253(a) to overturn a State's determination of how and whether to assign particular authority to its political subdivisions does intrude on state sovereignty, as this Court's cases make clear. See U.S. Br. 14-15. Accordingly, interpretation of Section 253(a) is subject to the *Gregory* rule, while application of the federal supplemental jurisdiction statute in *Jinks* was not.

C. No Clear Congressional Intent To Preempt State Laws Allocating Political Authority To Their Subdivisions Can Be Shown Here

Respondents argue (Br. 8-14) that, because the phrase "any entity" in Section 253(a) is a broad one, Section 253(a) clearly preempts state laws prohibiting political subdivisions from providing telecommunications services, and there remains no ambiguity to which the *Gregory* rule applies.

1. Respondents are mistaken. To be sure, as a purely linguistic matter, Section 253(a) could be interpreted to preempt not only laws that keep private businesses out of the telecommunications business, but also laws that keep political subdivisions or even state

agencies from that business. A court applying the *Gregory* rule, however, must "look[] for a clear statement of what the [law] *includes*, not a clear statement of what it *excludes*." *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002); see *Gregory*, 501 U.S. at 467 ("[I]n this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included."). The mere use of a phrase like "any entity" which, taken in isolation, is broad enough to encompass political subdivisions, may support the proposition that political subdivisions are not *excluded* by the language of the statute. But the mere use of such a general phrase is insufficient to establish that Congress clearly intended to *include* them.[3] Cf. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246(1985) (not sufficient under clear statement rule that a general reference to "any recipient of Federal assistance" could refer to States).[4]

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[3] Respondents cite a number of cases (Br. 12 n.3) that have construed statutes containing the term "any" broadly. With the exception of *Salinas* v. *United States*, 522 U.S. 52, 57 (1997), discussed below at p. 13 note 4, *infra*, however, none of those cases applied *Gregory* or any other clear statement rule that requires courts to be certain of Congress's intent before adopting a broad construction of a statute. Those cases therefore support the proposition that the language of Section 253(a) is broad enough that, absent a clear statement rule, it could be construed to preempt state laws allocating authority to political subdivisions. The cases do not, however, support respondents' argument that the use of the term "any" is sufficient to satisfy the *Gregory* clear statement rule and *require* that broad construction.

[4] Respondents mistakenly argue (Br. 41-42) that this Court's decision in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), supports their position. In *Yeskey*, the statute at issue expressly applied to "any department, agency * * * or

2. More fundamentally, the *Gregory* rule precludes a court from construing a federal statute to interfere with state authority in areas that are central to self-government unless it can be shown that Congress intended that effect. In this case, there is nothing in the text, structure, or context of Section 253(a) to indicate that Congress ever considered or intended the intrusive effect that Section 253(a), as interpreted by respondents, would have on state self-government.

a. *Statutory Text.* As discussed, the use of the phrase "any entity" does not provide any indication that Congress particularly considered—and intended—the intrusive effect that Section 253(a) would have on state self-government. It suggests at most a general intent by Congress that Section 253(a) should preempt state laws that grant exclusive franchises or otherwise limit private participation in the telecommunications market. Indeed, a central goal of the 1996 Act was "to accelerate rapidly *private sector* deployment of advanced telecommunications * * * by opening all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, 113 (1996) (emphasis added). Congress could easily have had just that general intent, without giving any consideration to the imposition on state sovereignty that would result if Section 253(a) were construed to limit a State's structural decisions about how and whether to allocate authority among its political subdivisions. Accordingly, the statutory text itself does not establish that Congress intended such an intrusive effect.[5]

b. *Structure.* The structure of Section 253(a) similarly contains no suggestion or implication that Congress intended to interfere in a State's internal allocation of authority among governmental units. To the contrary, construing Section 253(a) to preempt state laws that perform such an allocation would raise its own difficulties. Under the broadest possible reading of "any entity" in Section 253(a), that term would include not merely political subdivisions, but also state departments and agencies as well. It is doubtful that Congress intended under Section 253(a) to preempt not merely laws that "prohibit or have the effect of prohibiting the ability of" private parties to provide

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other instrumentality of a State." *Id.* at 210 (quoting 42 U.S.C. 12131(1)(B)). The Court held that *Gregory* was no obstacle to applying that statute to a state Department of Corrections, because the statutory text demonstrated that Congress specifically considered—and intended—to affect the internal operations of state government. In this case, there is nothing to suggest that Congress similarly considered and intended the effect on state sovereignty that would result if Section 253(a) were applied to preempt state laws allocating, or declining to allocate, authority to political subdivisions. See U.S. Br. 19-20.

[5] Respondents argue (Br. 40-41) that this Court's decision in *Salinas*, 522 U.S. at 57, stands for the proposition that the modifier "any" is sufficient, under the *Gregory* rule, to establish that Congress specifically intended the broadest possible reading of the term that follows. The Court's interpretation of the statute at issue in *Salinas*, however, was based not merely on the term "any," but on a number of other factors not present here. See Gov't Br. 21-22. Unlike Section 253(a), the statute at issue in *Salinas* expressly applied to "local * * * government" officials, 522 U.S. at 56, and thus it was clear that Congress specifically intended to regulate their conduct. Moreover, the interpretation at issue in *Salinas* did not implicate concerns central to state sovereignty to the same extent as would respondents' interpretation of Section 253(a). See *id.* at 22. A far closer analogy to this case is provided by *Raygor*, which did apply a clear statement rule and concluded that the term "any claim" is *not* sufficiently unambiguous to include claims that implicate core concerns of state sovereignty. See Gov't Br. 23-24.

telecommunications service, but also state laws that "prohibit or have the effect of prohibiting" a state energy department, public utility commission, or insurance commissioner from providing such service. Congress accordingly could not have intended the broadest possible reading of "any entity." The limiting principle that excludes state agencies or departments from the scope of that term excludes political subdivisions as well.

Respondents agree that preempting state laws that allocate authority among *state* governmental agencies and officials would be "absurd by anyone's lights." Resp. Br. 22. But they argue that their interpretation of Section 253(a) would not lead to that result, because another subsection—Section 253(b)—"ensure[s] that Section 253(a) would not produce results that are absurd, or that constitute an excessive incursion on State sovereignty." *Ibid.* Section 253(b), however, cannot do the work respondents' theory demands of it.

Section 253(b) provides:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.

47 U.S.C. 253(b). That provision is not a general saving clause for state laws whose preemption would be "absurd" or laws that would be "an excessive incursion on State sovereignty." It saves only state laws that are "necessary" to achieve the stated goals and that operate "on a competitively neutral basis." Thus, it saves laws that, for example, ban deceptive business practices. See, *e.g.*, *Cedar Rapids Cellular Tel., L.P.* v. *Miller*, 280 F.3d 874, 880 (8th Cir. 2002). But Section 253(b) would appear not to save state laws that are "competitively *non*-neutral" because they treat different categories of potential providers differently and expressly prohibit or have the effect of prohibiting some such categories of providers, such as state agencies or officers, from entering the telecommunications market at all. See, *e.g.*, *RT Communications, Inc.* v. *FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("competitive neutrality" means that rule must apply to "the market as a whole" rather than "one portion of a local exchange market"). If so, then state laws prohibiting state or local agencies or officers from providing telecommunications services would be preempted by Section 253(a) and not saved by Section 253(b)—just the result that respondents themselves concede is "absurd by anyone's lights."

Finally, although respondents argue (Br. 34) that the government's construction of Section 253(a) would require drawing lines between political subdivisions and private entities, respondents' view presents far more serious line-drawing problems. States operate with—and grant or deny powers to—a wide variety of different types of political subdivisions and other agencies. See Gov't Br. 18 n.3. Where a State has simply never clothed a particular subdivision (or state agency) with authority to operate in a commercial environment or where a State has created a limited-purpose subdivision or agency whose goals are far from the telecommunications market, respondents' position leads to indeterminancy. Courts would have to determine whether the restriction on the subdivision's or agency's authority is preempted under Section 253(a) as a "statute or regulation, or other State or local legal requirement," that "prohibit[s] or ha[s] the effect of

prohibiting the ability of [the subdivision or agency] to provide * * * telecommunications service." 47 U.S.C. 253(a). Nothing in Section 253(a) or in respondents' submission provides any guidance for resolving such questions.

c. *Context.* There is nothing in the context surrounding Section 253(a) that suggests that Congress considered—and intended—the intrusion on state sovereignty that would occur under respondents' construction of the statute. It is of course true that "Congress unquestionably intended utilities to be among the 'entities' protected by Section 253(a)." Resp. Br. 20. Congress clearly did intend to preempt state laws that closed the telecommunications market, including those that closed the market to electric or other utilities. Although preemption of such state laws does restrict state regulatory programs, that is the standard kind of restriction on state regulatory activity that attends federal preemption of state law generally, and it does not trigger application of the *Gregory* rule. But under respondents' construction, Section 253(a) would work a distinct and greater intrusion on state sovereignty, because it would result in federal regulation of the structure of state government and the allocation of authority among the State and its political subdivisions. There is no indication that Congress considered or intended that intrusion, and Section 253(a) accordingly may not, under *Gregory*, be construed to have that effect.

(i.) Respondents' sole attempt to find legislative history that would support their position consists of a single sentence in a statement made by Senator Lott at a hearing two years before the 1996 Act was passed. Respondents contend that Senator Lott's statement "places Congress's intentions * * * beyond doubt."

See Resp. Br. 20. But this Court has long recognized that "[i]n surveying legislative history * * * the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (internal quotation marks omitted). The Court has therefore "eschewed reliance on the passing comments of one Member, *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982), and casual statements from the floor debates." *Ibid.* It follows *a fortiori* that the remarks of a single Member that were made not in floor debates on legislation, but in a committee hearing held two years before the legislation was enacted, are not a reliable guide to legislative intent.[6]

In any event, Senator Lott's comment does not establish even that Senator Lott—much less Congress as a whole—considered and intended that Section 253(a) would work the serious intrusion on state sovereignty that respondents advocate. At the 1994 hearing, Senator Lott stated:

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[6] Respondents point out (Br. 21) that Senator Lott was "a Senate manager of the Telecommunications Act" in 1996. His future status as a manager of the legislation could not add to the authority of his comments in a committee hearing two years earlier. This Court stated in *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931), that it did not "think of significance the fact * * * that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by Senators who were not in charge of the bill." Senator Lott's statement was one "made to [a] committee[] of Congress" by someone who was not, at the time it was made, "in charge of the bill." Under *McCaughn*, therefore, it is not "of significance."

> I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here.

The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science and Transportation, 103d Cong., 2d Sess. 379 (1994). In that sentence, Senator Lott indicated that he believed that the new legislation should contain "the right language to accomplish what we wish accomplished here." But he did not state precisely what he "wish[ed] to accomplish here," and his statement accordingly fails to provide any support for an inference that Congress specifically considered and intended the effect on state sovereignty that would be entailed by preempting state laws allocating functions and authority to political subdivisions.

Moreover, the bill at the time Senator Lott spoke was different from the bill as enacted. It contained not only a provision similar to present Section 253(a), but also an additional subsection, later omitted, that provided that "an electric, gas, water, or steam utility may provide telecommunications services." See 140 Cong. Rec. 1130 (1994) (Section 230(b) of the proposed legislation as introduced). Both Senator Lott's statement and the comments of a witness who appeared the same day representing public power companies appear to have addressed that now-omitted provision, rather than the provision that became Section 253(a) itself. They accordingly provide no guide to the interpretation of Section 253(a).

(ii.) Respondents argue that, in preempting state laws that restrict or prohibit the entry of utilities generally into the telecommunications market, Congress "was well aware * * * that utilities are often owned by municipalities." Resp. Br. 20. But publicly owned electric utilities serve only 14.6% of electric customers and provide only 13.7% of the megawatt-hours of electric power generated nationwide. American Public Power Ass'n, *2003 Annual Directory and Statistical Report* 13, 14. They are therefore relatively minor players in the electric power industry. In any event, although Congress was aware elsewhere in the 1996 legislation that municipal utilities exist, see 47 U.S.C. 224(a)(1), nothing in the text, structure, or context of Section 253(a) suggests that Congress considered or intended to preempt state laws defining the authority of the political subdivisions of States. Accordingly, Section 253(a) may not be construed to have that effect.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT
OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL
STATE OF MISSOURI,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In his opening brief, petitioner Nixon, on behalf of the State of Missouri, points out that the Tenth Amendment's protection of state sovereignty – a key element in American federalism – affects the analysis here in two closely related respects. First, it bars any interpretation of § 253(a) of the Federal Telecommunications Act of 1996 that would remove from the States a key element of their sovereignty: the power to determine the scope of what their own subdivisions can do. Second, it requires that when Congress approaches the limits that Tenth Amendment federalism imposes on its power, it must do so clearly and unmistakably. *See Gregory v. Ashcroft*. 501 U.S. 452, 460-461 (1991).

The respondents, the "Missouri Municipals," run headlong into the constitutional wall when they characterize § 253(a) as entirely removing any state limits that even indirectly prevent them from entering the commercial telecommunications business. Of course, they deny that their argument goes that far, asserting that § 253(a) "is not an unprecedented or extraordinary intrusion on the authority of States to regulate matters pertaining to their subdivisions, and it does not raise any substantial constitutional questions." (Respondents' Brief ("MML Br.") at 7) But the Missouri Municipals articulate no limits on congressional authority. Indeed, implicit within their argument is the conclusion that merely by exercising their sovereign prerogative to create even specialized political subdivisions, the States concede to Congress a right to expand the authority of those subdivisions. In other words, by exercising its sovereign authority to create any political subdivisions, Missouri gave Congress the ability to transform that subdivision, extending its scope into areas Missouri never contemplated.

Though this Court may have never precisely defined the point at which Congress's ability to usurp state sovereignty ends, it also has never found in the Commerce Clause (Art. 1, § 8, par. 3) authority for Congress to redefine the nature of state subdivisions in the fashion the Eighth Circuit has allowed.

To keep Congress at a safe distance, the Court has erected a prophylactic barrier that prevents Congress from breaching the constitutional wall that protects state sovereignty: the "clear statement" requirement most clearly articulated in *Gregory v. Ashcroft*. That barrier works in two ways. Legally, it eliminates many, perhaps inadvertent, approaches to the constitutional wall. Politically, it gives the states a warning when Congress threatens to breach state sovereignty. But the Missouri Municipals would transform the "clear statement" barrier into something so easily moved that it provides the States with no protection whatsoever.

Worded as it is and properly interpreted within the framework of the Constitution as outlined by this Court's interpretive opinions, § 253(a) would not present an incursion on the authority of States to regulate their own political subdivisions and would not, consequentially, be unconstitutional.

ARGUMENT

I. Congress does not have unlimited power to expand the authority of State subdivisions, as the Missouri Municipals claim.

The "plain statement rule" in *Gregory v. Ashcroft* notwithstanding, Congress cannot take away all powers of the State. To do so would violate the Tenth Amendment no matter how well intentioned a statute may be. In other words, the Tenth

Amendment carves out some ground of sovereignty upon which Congress cannot lawfully tread – even if the exercise of that portion of state sovereignty could affect commerce. The exact line beyond which Congress cannot go is not well marked. And it is not a line that this Court has to draw to allow Missouri's statute to withstand preemption.

The Missouri Municipals do not and cannot dispute that control of subdivisions is a core element of state sovereignty. *See New York v. United States*, 505 U.S. 144 (1992). To parry Missouri's defense of that element, the Missouri Municipals formulate an attack that consists largely of discussion of a handful of cases in which this Court upheld congressional acts that affect those subdivisions. But never in any of those decisions did this Court suggest Congress could do what the Missouri Municipals claim Congress did here: use the Commerce Clause power to bypass the States entirely and directly authorize political subdivisions to extend or even transform themselves, entering commercial businesses beyond the imagination of the legislators who voted to authorize their creation. Typically, those cases confirm congressional power to affect how subdivisions operate within the scope of state-granted authority, not whether Congress can expand that authority.

The Missouri Municipals cite *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985), broadly asserting that there, the Court upheld congressional power to grant local government certain prerogatives that State law could not override. *Lawrence County* is a spending power (Art. 1, § 8), not a Commerce Clause case; it arose in the context of Congress appropriating federal money to local governments. The Court held that South Dakota could not seize those funds for

another purpose. *Id* at 268. In other words, Congress controlled who received federal funds, and barred someone other than the recipient from taking them. That is a far cry from forcing a State to accept that Congress just handed one of its political subdivisions authority to dive into the commercial phone business, regardless of that subdivision's lack of state authority to become an entrepreneur and at the expense of private sector, taxpaying competitors. Moreover, the statute involved in *Lawrence County*, though not completely unambiguous (*id.* at 261), was clearer in its terms than is § 253(a), and the statute's legislative history, as admitted by respondent in that case, evidenced a clear intent by Congress (*id.* at 262).

The extent of the Missouri Municipals' discussion of *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002) and *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) is puzzling. In those cases the Court, overall, was respectful of the kind of state sovereignty that the Missouri Municipals deny exists.

In *Ours Garage*, the Court states a truism: that preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." 536 U.S. at 432, citing *Mortier*, 501 U.S. at 605, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court goes on to quote *Mortier*: "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." 501 U.S. 597 at 607-608, quoted at 536 U.S. at 433. But the Court then affirms a central premise of Missouri's argument

here: "Whether and how to use that discretion is a question central to state self-government." 536. U.S. at 437. Missouri has used its "absolute discretion" to define the authority of its subdivisions in a way that precludes, for the time being, their entry into the commercial telecommunications business. Nothing in *Ours Garage* suggests that Congress has unfettered authority to deprive the states of that discretion – *i.e.*, to itself answer this "question central to state self-government."

Rather than *Ours Garage* or *Mortier*, the case cited by the Missouri Municipals that comes closest to supporting their argument is *Jinks v. Richland County*, 123 S.Ct. 1667 (2003). There, this Court upheld 28 U.S.C. § 1367(d) (1976). 123 S.Ct. at 1672. That statute tolls state statutes of limitation on state law claims during the period in which a federal cause of action is pending. The Court did not, however, suggest that such a step was authorized by the Commerce Clause. Rather, the Court held that § 1367(d) is necessary and proper in executing Congress's power "[t]o constitute Tribunals inferior to the supreme Court[,]" and "to assure that those tribunals may fairly and efficiently exercise, '[t]he judicial Power of the United States[.]" *Id.* at 1671, citing Art. I, § 8, cl. 9 and Art. III, § 1.

In applying § 1367(d) to municipalities, in *Jinks* the Court cast aside concerns that, as held in *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), § 1367(d) does not apply to claims against States. It held that the statute "is not an encroachment on 'state sovereignty,' but merely the consequence of those cases (which respondent does not ask us to overrule) which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." 123 S.Ct. at 1673. By contrast to § 1367(d), § 253(a) is not based on

Congress's need to constitute tribunals inferior to this Court and its responsibility to assure the fair and efficient exercise of judicial power by the United States. And it does not infringe on a right claimed, under state law, by municipalities; it infringes on a right claimed by the sovereign states themselves.

The Missouri Municipals also rely on this Court's sovereign immunity cases, i.e., cases dealing with immunity possessed by sovereign states, delegated to non-sovereign municipalities. This Court has, as the Missouri Municipals suggest, found a limit on the scope of such delegated immunity: "If a state wishes a power to be exercised free of risk of liability, it must retain the power in 'an arm of the State' . . . it cannot delegate that power to a political subdivision." (MML Br. 31, quoting *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977)). But the foundation of that conclusion is that sovereignty lies with the State, not with local government – a foundation that also supports Missouri's assertion that the States create and control municipalities and municipal utilities, a philosophy this Court has honored for nearly a century. (*See* Petitioner Nixon's ("Nixon") Br. 9-17). To suggest, as the Missouri Municipals do, that by holding that the State cannot delegate its sovereignty, the Court somehow ruled that Congress can overrule a decision not to delegate, makes no sense at all.

Nor does the one concession that the Missouri Municipals suggest might be a limit on the scope of their argument for congressional power: a distinction between state subdivisions' regulatory powers and their commercial activities. *See* MML Br. at 26 n. 11 (*Mortier* and *Ours Garage* "implicate State sovereignty much more directly than Section 253(a) does . . . Because those cases concerned the States'

control over their subdivisions' regulatory powers, not just over the subdivisions' commercial activities."). The Missouri Municipals concede that "[r]egulatory authority is the defining feature of government." *Id.* at 28. But their effort to distinguish "regulatory authority" from "commercial activity by a political subdivision" means nothing here, for what is at issue is the States' "regulatory authority": their ability to regulate the scope of activities of the subdivisions they authorized and for which they, ultimately, are responsible. As recognized in the cases discussed in Missouri's opening brief, this Court has recognized that States regulate the ability of subdivisions to operate in many ways. (Nixon Br. 12-14). And the regulation at issue here is no further removed from the core of state sovereignty – and extends no further into the realm of commerce – than is regulation of the purchase and ownership of real property or choosing the locale of its seat of government. *See State of New York v. United States*, 326 U.S. 572, 582 (1946) and *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

Aside from this regulation/commercial activity distinction, the Missouri Municipals make no meaningful attempt to define any line that Congress cannot cross in exercising its Commerce Clause powers against the States' definition of their subdivisions' authority. That failure highlights the true breadth of their position: that there is no limit on congressional power, so long as the authority Congress gives to state subdivisions somehow relates to interstate commerce.

Attempting to draw a negative inference to support the conclusion that there is no limit, the Missouri Municipals assert that no justice of this Court has ever suggested that it would be unconstitutional for Congress to grant limited powers to a

local government if a state law were unconstitutional. (MML Br. 31, 33). That may well be true. But the Missouri Municipal's explanation – that no justice has commented on a limit because there is no limit – is the least likely of the possible explanations for that dearth of authority. More likely, the Court has never been faced with a challenge to state sovereignty quite like this one. And most likely, when the Court considers a statute that approaches a point of unconstitutional usurpation, it finds ambiguity and resolves it against preemption – using the *Gregory v. Ashcroft* rule.

II. The phrase, "any entity," is too broad to meet the *Gregory v. Ashcroft* test.

Missouri is cognizant of Justice Scalia's assertion, in his dissent in *Ours Garage*, that a State's right to control its own political subdivisions is not within the sacrosanct ground of Tenth Amendment protection. 536 U.S. 424, 448 (2002). As discussed above and in its opening brief, Missouri respectfully disagrees. But even the Eighth Circuit concluded that the right to control political subdivisions is so close to the impenetrable realm of state sovereignty that any effort to encroach upon it must be subject to the *Gregory v. Ashcroft* "clear and manifest" rule. (Nixon Pet App. A-8). Despite exhaustive efforts in their brief, the Missouri Municipals fail to find a "clear and manifest" statement in § 253(a) that Congress intended to bar the very states whose "statutes," "regulations," and "legal requirements" are at issue from regulating the activities of their own political subdivisions.

Not surprisingly, the Missouri Municipals' first approach is to avoid *Gregory v. Ashcroft* entirely. They state that *Gregory v. Ashcroft* applies only when a statute is ambiguous, and they argue that

§ 253(a) is not ambiguous (MML Br. 36), insisting that the meaning of § 253(a) is plain because "any entity" is so broad as to cover literally everything. Were that true, there would not be such a difference of opinion among the courts as to the meaning of "any entity." *See* Nixon Pet. 9-12. And if the use of a broad term were sufficient, the *Gregory v. Ashcroft* rule would have little application, and even less meaning. Certainly, it is possible to call state subdivisions "entities" and thus to include them among "any entities"; there are definitions of "entity" that could encompass the concept of municipalities or political subdivisions. But "entity" is an amorphous word, akin to "thing" or "stuff." Under *Gregory v. Ashcroft*, the use of such amorphous words has never been enough. *See, eg. Vermont Agency of Natural Resources v. United States ex. rel Steven*, 529 U.S. 765, 787 (2000) (the False Claims Act's use of "any person," 31 U.S.C. § 3729(a), does not provide the requisite affirmative indications to include States for the purpose of *qui tam* liability.)

Arguing to the contrary, the Missouri Municipals place great reliance on *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). There, the Court held that "public entity" met the *Gregory v. Ashcroft* test and included state prisons among the bodies responsible to adhere to the Americans with Disabilities Act ("ADA"). Of course, "public entity" is considerably more specific and clear than "any entity." But the distinction does not end there; the statute adjudicated in *Yeskey*, Title II of the Americans with Disabilities Act, contained a definitions section. The definition of "public entity" included language that made clear a congressional intent to impose certain provisions of the ADA on States, including their subdivisions. *Yeskey*, 524 U.S. at 209-210. By contrast, the Federal Telecommunications Act of 1996 does not provide a

definition of "entity." Nor does it provide a contextual framework to gather one's bearing regarding the use of that word. Therefore the Missouri Municipals' (and for that matter, the Eighth Circuit's) reliance on *Salinas*' discussion of the term "any" begs the question of the meaning of "entity." *Salinas v. United States*, 522 U.S. 52 (1997).

Salinas stands for the premise that the word "any" is an inclusive term. No one debates that premise. But "any" does not add context to the term "entity," any more than it would put context on the term "car." Would "any car" include sport utility vehicles, pick up trucks, and Matchbox™ cars? The context of Congress' use of the term "any entity" in § 253(a) is not clear. Placing the all-expansive modifier "any" before "entity" does not provide a good contextual compass.

Nothing in § 253(a) or the rest of the Federal Telecommunications Act of 1996, nor its legislative history, provides any meaningful evidence that in drafting § 253(a), Congress purposefully, intentionally, clearly, or unmistakably elected to interfere with the States' sovereign right to control their own political subdivisions.

Though the State is insisting that *Gregory v. Ashcroft* does not – and should not – permit Congress to draw in the States and their subdivisions merely by using amorphous terms like "entity," the State is not insisting, as the Missouri Municipals suggest (MML Br. 7-8, 37), that § 253(a) fails because Congress did not "explicitly mention municipalities." Under *Gregory v. Ashcroft*, the question is whether the inclusion is "clear and manifest," not whether Congress uses some magic word. Congress could have made its intent clear and unmistakable in a variety of ways. An express

inclusion of municipal utilities would have been the best way to solve § 253(a)'s *Gregory* problem. But Congress could also have defined "entity" in some other way that nonetheless demonstrated a conscious choice to unbalance federal and state sovereignty.

The Missouri Municipals implicitly suggest that Congress can meet the *Gregory v. Ashcroft* standard not just through statutory language, but also through legislative history. In doing so, they fail to explain why the statements of legislators should be allowed to give constitutionally sufficient clarity where the statutory language itself fails to do so. But even if legislative history were an appropriate remedy to a *Gregory* problem, the Missouri Municipals' argument would fail, for they grossly overstate the historical case.

They assert, "There is incontrovertible evidence that Congress intended to enable utilities to enter, and compete in, telecommunications markets." (MML Br. 18). While it may be true that Congress intended to enable utilities to enter telecommunications markets, there is no incontrovertible evidence Congress actively considered municipalities' entrance into those markets, and there is no evidence whatsoever that Congress weighed the concern of state sovereignty in drafting the language of the '96 Act. The Missouri Municipals spend pages (MML Br.18-21) discussing the Act's legislative history. What they do not tell this Court is that the discussion of the Act's predecessor bill, S.1822, took place in the context of a hearing relating to whether public utility holding companies, which are restricted in many ways under the Public Utility Holding Company Act ("PUHCA"), should be able to compete in the telecommunications markets. The consensus, which none of the petitioners

debate, is that they should. But, neither municipalities nor municipal utilities are PUCHA regulated companies. So when the Missouri Municipals cite a couple of phrases from Senator Lott, they are pulling the quotes out of context. The Missouri Municipals are borrowing statements made in the context of private enterprise competition.

The '96 Act was specifically designed to break the stranglehold the regional bell operating companies ("RBOC's") had on local service monopolies. It applied a carrot and stick approach, with the stick being a codified injunctive action, essentially tracking the federal court order that broke up AT&T in 1982. *See* Consent Degree issued August 24, 1982, *United States v. Western Electric*, Court Action No. 82-0192, U.S.D.C. D.C.; 47 U.S.C. § 271. The Act barred the RBOC's from providing long distance service until they had opened their local facilities to competition. 47 U.S.C. § 271. The Act and its legislative history are devoid of any meaningful discussion that municipalities or municipal utilities could or should be the RBOC's competitors. There are no statements in the Act's history that remotely suggest Congress considered the rights of the States as sovereigns to control the activities of their own political subdivisions and, notwithstanding States' sovereignty, chose to interfere with that fundamental element of States' rights.

The Missouri Municipals also describe a parade of horrors that would result, they say, from excluding state subdivisions from among the "entities" protected by § 253(a). But the parade is an illusion.

The Missouri Municipals assert that if "any entity" were read to exclude all state subdivisions, it might exclude private enterprises (MML Br. 9). That argument leaves out a critical factor: the body

of precedent regarding the relationship between a state and its municipalities, including municipally-owned utilities. (*See* Nixon Br. 9-17). Neither that body of precedent nor the States' core sovereignty is offended by Congressional action that preempts restrictions on private enterprise ventures in areas of commercial services. The States all create different forms of business organizations for the purpose of offering limitations on liability. The States do not generally cling to a business organized under their state laws the same way they do to the very subdivisions they create, with good reason. The latter enjoy the sovereign authority specifically delegated to them by their State parent. Private enterprise does not exercise any sovereign authority.

The Missouri Municipals next lament that the FCC would be distinguishing between political subdivisions and entities. In actuality, the FCC's preemption analysis will not be much different than it has been. The FCC will examine a statute under its § 253(a) analysis and receive comments from all or anyone. A State will have the opportunity to defend its statute and can advise the FCC if its law pertains to a political subdivision. The FCC will be looking to see if a statute restricts competition. If that statute applies to political subdivisions, as Mo. Rev. Stat. § 392.410.7 does, the FCC will continue what it has done with the Texas and Missouri laws – respect state sovereignty. If the state statute is directed elsewhere, the FCC will assess whether it is competitively neutral under § 253(b). It is unlikely that the problem of discerning upon whom a state statute is applicable will need resolution by the FCC. If a political subdivision is acting outside its authority through some form of business venture, in all likely the State will resolve that issue in state court through injunction or writs of mandamus or prohibition.

In describing illusory horrors, the Missouri Municipals brush past, but essentially ignore, the Pandora's box that their own view of § 253(a) opens. Thus they assert that "the language of Section 253(a) is unequivocal" and announce they will disprove petitioners' argument that employing an all-inclusive definition of "entity" produces absurd results. (MML Br. 21). But they fail to deliver. Instead, in responding to the argument that the Eighth Circuit's definition of "any entity" now empowers Missouri's Interior Design Council, an "entity" using the Black's Law Dictionary definition employed by the Eighth Circuit to enter the telecommunications business, the Missouri Municipals point the State to § 253(b) for relief. But § 253(b) cannot give the State effective relief – at least not without also depriving the Missouri Municipals of the victory they seek.

Section 253(b) states, "Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunication services, and safeguard the rights of consumers." The Missouri Municipals fail to explain how § 253(b) places any limits on the definition of entity.

Instead, they assert that § 253(b) allows a state to allocate responsibilities among various government officials and agencies without having to authorize each of them to provide telecommunications services. (MML Br. at 22-23). To a certain extent, it is curious that the Missouri Municipals cite § 253(b) for the premise that it allows a state to "allocate" responsibilities, because, that being the case, the State has not "allocated" to any of the Missouri

Municipals the authority to provide telecommunications services.

If § 253(b) protects state sovereignty to the degree the Missouri Municipals claim, then even if the term "any entity" includes political subdivisions, the States are allowed to make their own determinations as to what competitively neutral requirements are necessary to protect the public welfare, ensure quality of telecommunication services, and safeguard the rights of their own consumers. In which case, Missouri, through its general assembly, and specifically through Mo. Rev. Stat. § 392.410.7, has implicitly determined that § 253(b) permits it to protect the public by leaving the risks and the profits of the telecommunications business in non-governmental hands.

Moreover, despite the Missouri Municipals' faith in § 253(b), nothing about it protects Missouri's sovereign right to decide that the Board of Healing Arts is authorized only to regulate the conduct of medical doctors and osteopaths, the Cole County Assessor is authorized only to appraise real and personal property within Cole County, Missouri, and City Utilities of Springfield is authorized only to generate and distribute electricity to Missourians in Springfield – and that none of these "entities" are authorized to enter the commercial telecommunications business.

III. That there may be a pro-competitive justification for the policy of allowing government units to compete in the telecommunications marketplace does not affect the *Gregory* analysis.

The Missouri Municipals want this Court to read § 253(a) from a results-oriented perspective – what

is likely to bring the most competition given that no one argues against the premise that the Telecommunications Act of 1996 envisioned the opening of telecommunications markets. Unfortunately, the Missouri Municipals appear to be re-writing history as it pertains to the '96 Act.

The State of Missouri supports competition and the benefits of competition that are the underlying goal of the '96 Act. It has fought hard at the Missouri Public Service Commission and at the FCC, going against Southwestern Bell, SBC, Ameritech, GTE (now Verizon), and some of the petitioner's amici. Missouri fully embraces the concept of competition on a level playing field. But Missouri's legislature has made the policy determination that government entering the private sector will not create a level playing field, and in fact, may kill the vibrant business of small incumbent local exchange carriers that provide local service to Missouri's four corners and enable it to brag about a 95.8% rate of telephone service penetration statewide, while the national average is 94.4%. (*See* Table 17.2, FCC Report, Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, August 2001. File Names: TREND101.ZIP, TREND101.PDF AT www.fcc.gov.ccb.stats.) Competition from the government can also stymie private enterprise in more populated areas where competing local exchange carriers, particularly those who are facilities based, might be dissuaded from competing against both and incumbent local exchange carrier (particularly in the form of large, nationwide local exchange carriers) and the local municipality.

States can allow their municipal utilities to provide telecommunications services under the '96 Act. And some States do. But allegations of increased

competition and broader service – even if they are true – do not justify removing from the States the power to weigh the advantages and disadvantages, the risks and benefits, of letting public agencies become commercial businesses.

The Missouri Municipals refuse to acknowledge that this case is not about telecommunications. One could substitute any subject matter for the last two words of § 253(a) – "telecommunications service" – and Missouri would still be here, arguing its sovereign right to withhold authority from its own political subdivisions. The economic arguments about allowing municipalities to provide commercial telecommunication services cut both ways and have no bearing on the real issue in this case – the sovereign right of a state to control its own political subdivision. If Congress can interfere with a state's control over its political subdivisions "unselfconsciously" (borrowing that term from MML Br.11), using terms that do not clearly or unmistakably demonstrate that Congress chose to usurp state sovereignty, then the plain statement test in *Gregory v. Ashcroft* is dead, and worse, the Tenth Amendment becomes a vestige of history.

CONCLUSION

For the reasons stated in the State's opening brief and further explained above, the Court should reverse the Eighth Circuit's decision and remand the case with instructions to reinstate the FCC's order denying preemption of Mo. Rev. Stat. § 392.410.7, and thus preserve the States' power to allocate authority to and among their officers, agencies, and political subdivisions.

Respectfully submitted,

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AND

FEDERAL COMMUNICATIONS COMMISSION
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AND

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
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The rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), serves a fundamental purpose in this Court's jurisprudence. It ensures that Congress will be found to have intruded on core state prerogatives only when it is plain that the Legislative Branch focused on a sensitive issue of federalism and nevertheless decided to alter the balance of federal-state power. As the Court has explained, the *Gregory* plain-statement rule ensures that the Court will not conclude that Congress has negated a "historic power of the States" unless the statute demonstrates that "'"the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting in turn *United States v. Bass*, 404 U.S. 336, 349 (1971))).

Respondents' brief does not demonstrate that this established standard is met here. Respondents cite no statutory language (or even legislative history) showing that Congress "faced" and "intended to bring into issue" the specific question posed here: whether States should be prevented from exercising their ordinarily absolute discretion over the powers they grant to their political subdivisions by requiring them to allow those subdivisions to offer telecommunications services.

No such evidence exists. That is because, in enacting the Telecommunications Act of 1996 (the "1996 Act"), Congress was not focused on the unique and difficult issues raised by political subdivisions offering telecommunications services, but rather was interested in replacing laws that prohibited competition of any kind in such markets with a regime that would "accelerate . . . *private sector* deployment of advanced telecommunications." S. Conf. Rep. No. 104-230, at 113 (1996) (emphasis added). The innovation of the 1996 Act lay in its requiring, as a matter of federal law, that States permit

private competition in local telecommunications; it was not in preventing the States from determining whether their own political subdivisions may offer such services.

Because respondents cannot point to any specific statutory language showing that Congress faced and intended to resolve the federalism issue presented here, they rely on the same sort of "general language" that this Court has previously concluded does not demonstrate the requisite plain statement of an intent to override a State's interest in its own self-government. *Raygor*, 534 U.S. at 544-45. But, even wrenched from context, the phrase on which respondents rely – "any entity" – is substantially more ambiguous in its application to States and their subdivisions than others (such as "any recipient of Federal assistance") that the Court has found *not* to be sufficient to satisfy its plain-statement requirements.

When the phrase "any entity" is read *in context*, as it must be, it is evident that 47 U.S.C. § 253(a) is, at a minimum, ambiguous on this point. Indeed, respondents have no cogent response to our showing that their reading of section 253(a) would lead to what they concede are absurd results. They do not contest that, under their reading, a State would be able to abolish a subdivision altogether, but could not prevent that subdivision from offering telecommunications services. Likewise, they do not contest that under section 253(a) a mayor could ignore a town ordinance that prevented the town from offering telecommunications services. They argue, however, that section 253(b) prevents that absurd result. It does not. Section 253(b) does not apply to state or local actions that are not "competitively neutral," and a law that barred one supposed "entity" (the town) from offering telecommunications would not pass that test.

In the end, although respondents do not overtly argue that *Gregory* does not apply here, their real argument is that the Court should depart from that precedent and its plain-statement rule. Indeed, they go so far as to argue that *Gregory* "does not require that an ambiguity automatically be resolved against Congress's effort to empower local governments" even where, as here, that "empowerment" comes at the expense of a State's sovereignty interest in controlling its subdivisions. Resp. Br. 38. That, however, is exactly what *Gregory* does require. Under that decision, anything less than a "clear and manifest" demonstration in the statutory text of a legislative intent to divest States of their core sovereign powers is insufficient to alter the federal-state balance. 501 U.S. at 460-61 (internal quotation marks omitted). And there is no basis to argue, as respondents do implicitly, that the unanimous judicial determinations that *Gregory* applies in this context are incorrect. Control over political subdivisions is, in this Court's words, "central to state self-government," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002), and, like *Gregory* itself, involves the State's "establishment and operation of its own government," *Gregory*, 501 U.S. at 462 (internal quotation marks omitted). Accordingly, the *Gregory* rule squarely applies, and it defeats respondents' claims.

ARGUMENT

UNDER THIS COURT'S PRECEDENTS, SECTION 253(a) DOES NOT SPEAK WITH THE CLARITY NECESSARY TO DEPRIVE STATES OF THEIR ABILITY TO CONTROL THEIR OWN SUBDIVISIONS

A. The Language of Section 253 Does Not Demonstrate a Clear and Manifest Intent To Preempt States' Prerogatives To Control Their Political Subdivisions

1. Respondents claim that the phrase "any entity" is, in isolation, sufficiently "inclusive" that it may be "naturally" read to cover political subdivisions. They therefore argue that the Court should find that Congress stripped States of their deeply rooted authority to control the actions of their political subdivisions. *See* Resp. Br. 8-14. Respondents stake their case primarily on the allegedly inclusive nature of this phrase read in isolation. *See, e.g., id.* at 13-14 (relying on use of this "expansive" phrase to assert that the "meaning of Section 253(a) could hardly be clearer").

Even on its own terms, that analysis runs headlong into this Court's precedents. The phrase "any recipient of Federal assistance" is certainly, in isolation, inclusive enough that it *could* be read to encompass the States, especially in a context where it is undisputed that a state defendant is a recipient of federal aid. Under respondents' theory, the use of such a general phrase should constitute a plain statement sufficient to limit the States' historic prerogatives. The Court, however, concluded differently. It found that such a "general authorization for suit" was *not* enough to diminish the rights of the States. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

Likewise, the phrase "any claim" is, by itself, potentially inclusive enough to include claims brought against States. But in *Raygor*, too, however, the Court determined that the statutory language did not show a "specific or unequivocal" intent to apply to claims brought against the States. 534 U.S. at 545. Under respondents' theory, the Court should have reached a contrary conclusion.

Respondents wrongly claim that the Court's decision in *Jinks v. Richland County*, 123 S. Ct. 1667 (2003), somehow diminishes the relevance of *Raygor* to this case. In fact, *Jinks reinforces* the importance of the plain-statement rule that applies here. In *Jinks*, the Court concluded that, because, under prior decisions that were not challenged there, the Eleventh Amendment does not protect municipalities (unlike States), there was no "state sovereignty" concern that would require an "unmistakably clear" statement of congressional intent. *Id.* at 1673 (internal quotation marks omitted). In this context, by contrast, the Court has found that plain-statement rules *do* apply to matters involving the "structure of [state] government," *Gregory*, 501 U.S. at 460, and has stressed that state control over political subdivisions is "central to state self-government," *City of Columbus*, 536 U.S. at 437. For those reasons, *Gregory* applies in this context, as even the Eighth Circuit acknowledged. *See* SWBT Pet. App. 5a-6a. Because *Gregory*'s plain-statement rule applies, *Raygor*, not *Jinks*, is the appropriate analogy. The fact that *Raygor* and

Jinks came out differently simply shows that the plain-statement rule applicable here has real significance in this Court's interpretation of statutes.

Salinas v. United States, 522 U.S. 52 (1997), a case respondents (and the Eighth Circuit) have stressed, is likewise inconsistent with respondents' argument that the "any entity" phrase by itself establishes that Congress intended to override States' "absolute discretion" as to the "number, nature and duration of the powers conferred" on their subdivisions. *Sailors v. Board of Educ.*, 387 U.S. 105, 108 (1967) (internal quotation marks omitted). In *Salinas*, the Court did *not* conclude without further inquiry that the phrase "any business, transaction, or series of transactions" by itself was sufficient to apply federal bribery law to state officials. Instead, the Court also discussed what it concluded was "broad" surrounding statutory language – including the statutory definition of the "circumstances" in which the bribery statute would apply, which Congress made plain included all instances where a "*government*" received federal benefits. 522 U.S. at 57 (emphasis added). The Court also detailed the important evidence of legislative intent contained in the history of amendments to the relevant statutory provisions. *See id.* at 58-59. The Court thus rested its decision in *Salinas* not just on a general phrase in isolation, as respondents mistakenly argue (at 41), but on the "chronology and the statutory language" *as a whole*. 522 U.S. at 58.

As we explained at the outset, there is a fundamental reason that the Court has repeatedly concluded that this kind of "general language" that respondents rely upon should not be dispositive. Such language does not demonstrate that Congress "has in fact faced" and "intended to bring into issue" the "critical matters involved in the judicial decision." *Raygor*, 535 U.S. at 544 (internal quotation marks omitted). Accordingly, it is significant that respondents have cited *nothing* in the text of section 253 that demonstrates that Congress faced the specific question of preempting state determinations as to regulation of political subdivisions, nor could they do so.

In this regard, our claim is not, as respondents assert, that the only way to satisfy *Gregory* is to "explicitly mention municipalities" in the statute. Resp. Br. 39. On the contrary, there are many different ways that Congress could have indicated that it intended to take the extraordinary step of denying States the right to control the actions of their political subdivisions. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), a case that respondents highlight (at 40, 41-42), is instructive on this point. There, Congress not only referred specifically to "public entit[ies]," but also expressly defined that term to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. §§ 12131(1)(B), 12132. Given that specific definition, this Court had no difficulty finding that the *Gregory* rule was satisfied as to state prisons. Congress could have included similar or equivalent language here, which would have satisfied *Gregory* even though it did not refer to municipalities. The difference between the specific congressional intent shown by the language in *Yeskey* and the general language on which respondents are forced to rely is telling.

2. Even in isolation, the language that respondents highlight is more ambiguous than the textual evidence that the Court found insufficient to satisfy the *Gregory* standard in prior cases.

Although we have never disputed that the term "entity" *could* be read to encompass political subdivisions, there is ample reason to believe that it does not *necessarily* do so. In fact, the precise contours of that term have long been understood to be ambiguous. Courts have repeatedly found that, absent a statutory definition, that term is ambiguous. *See, e.g., Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (the term "entities" "bears different meanings depending upon the context"); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding the word "entity" to be ambiguous in 47 U.S.C. § 275(a)(2)). And, to avoid such ambiguities, Congress has defined that term over and over in the United States

Code, and has done so in ways that both include and exclude political subdivisions – for instance, elsewhere in the Communications Act itself, Congress defined the term "noncommercial telecommunications entity" to include, among other things, bodies owned by a "State" or a "political . . . subdivision of a State." 47 U.S.C. § 397(7).

Respondents simply ignore this last piece of evidence, even though this Court has concluded that the use of such specific language elsewhere in a statute provides an important indication of Congress's intent. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted; alteration in original).

Respondents' answer to the fact that, in other contexts, Congress has defined "entity" both to include and to exclude political subdivisions is to suggest that Congress uses these definitions merely to "limit[]" that term. Resp. Br. 14. That claim is incorrect. In fact, Congress often defines the term "entity" where it desires to clarify that it intends that the term be read *broadly*, as in 10 U.S.C. § 2871(5), where "eligible entity" is defined to include "any private person, corporation, firm, partnership, company, [and] State or local government," and in 16 U.S.C. § 4502a(c)(1), where the same term is defined to include both "political subdivision[s] of a State" and "private organization[s]." Thus, Congress has defined this term not to narrow an otherwise-clear meaning, as respondents would have it, but to demonstrate clearly that, unlike in this case, it wanted "to cover the waterfront and omit no possibilities." Resp. Br. 11. That fact demonstrates that Congress understands that the term is inherently vague as to its scope and that definition is needed to apply it both broadly and narrowly.

Nor is it relevant to whether Congress understood political subdivisions to be "entities" separate from the States that, for some purposes, such as the Eleventh Amendment, this Court

has treated the States and their political subdivisions separately. *See id.* at 10. It is equally the case that, for other purposes, such as the Tenth Amendment, the Court has concluded that political subdivisions should be treated no differently than the State itself. *See Printz v. United States*, 521 U.S. 898 (1997); *see also Waller v. Florida*, 397 U.S. 387 (1970) (finding that States and localities should be treated the same for purposes of the Double Jeopardy Clause). Accordingly, even if Congress were assumed to look at this Court's jurisprudence on such issues to determine whether a locality would be understood to be a separate "entity" from the State – which would appear to be a tenuous line of reasoning – that would only confirm the existence of substantial ambiguity here.

3. If respondents had stronger evidence that the term "entity" in isolation unequivocally covers political subdivisions, their argument would still lack merit. That is because the statutory context of section 253 demonstrates that Congress did not unequivocally intend to deprive States of their authority over political subdivisions. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). As an initial matter, as the FCC concluded (*see* SWBT Pet. App. 19a), given the phrasing of section 253(a), it is in fact most natural to read section 253(a) to apply to "entities" that are ordinarily subject to "State" and "local" telecommunications regulation, and not to the States and their subdivisions themselves, which are normally the bodies that would *create* such regulations. *Cf.* Resp. Br. 9.

Beyond that, respondents have no plausible response to our showing that, if the term "entity" is read to encompass the States and their political subdivisions, it would lead to absurd results that Congress could not have intended. *See* SWBT Br. 19. Respondents do not deny that, under their reading of section 253(a), that provision by itself would allow a town's mayor to ignore a town ordinance prohibiting the provision of a telecommunications service because that ordinance

would be a "local statute or regulation" that has the effect of prohibiting the political subdivision from providing a telecommunications service. Instead, respondents argue (at 22-23) that section 253(b) somehow avoids such obviously absurd results.

That is simply wrong. If localities are "entities" under section 253(a), then section 253(b) would not permit any local ordinance barring such "entities" – and only such "entities" – from offering telecommunications. Section 253(b) preserves state and local rules only if they are "*competitively neutral*." A local law barring only one kind of "entity" from offering telecommunications could not conceivably be competitively neutral. *See, e.g.*, Declaratory Ruling, *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, 15175-78, ¶¶ 19-24 (2000) ("competitively neutral" rules cannot "unfairly advantage nor disadvantage one provider over another") (internal quotation marks omitted). Accordingly, a result that respondents concede is "absurd by anyone's lights" (Resp. Br. 22) is avoided only if section 253(a) itself is read *not* to affect statutes and ordinances barring local government participation in telecommunications markets.

Read in that more reasonable way, moreover, section 253(a) coheres with section 253(b)'s plain intent to preserve important policies of particular concern to the States. *See City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999) (stressing that section 253(b) "set[s] aside a large regulatory territory for State authority"); SWBT Br. 20-21 (explaining that section 253(a) should be interpreted in a manner consistent with Congress's evident respect for traditional state prerogatives in section 253(b)). Respondents' position, by contrast, results in section 253(b) being highly respectful of traditional state policies, but section 253(a) intruding on one of a State's most fundamental sovereign rights – the ability to control its subdivisions. It would have been odd indeed for Congress to intend such a jarring disjuncture.

Respondents likewise do not have any plausible explanation as to why section 253(a) should be read to create a bizarre scheme under which federal law permits States to abolish localities altogether, but prevents them from taking the much more limited step of stopping localities from offering telecommunications services. *See* SWBT Br. 19. Respondents appear to respond by claiming that it would not be "extraordinary" for Congress to limit state authority in this manner. Resp. Br. 24-25. That argument cannot be squared with established principles. As we have stressed, this Court has made plain not only that States have "absolute discretion" to determine what powers political subdivisions will exercise, but also that "[w]hether and how to use that discretion is a question central to state self-government." *City of Columbus*, 536 U.S. at 437 (internal quotation marks omitted); *see also* SWBT Br. 13-14 (collecting multiple authorities). Contrary to respondents' assertions, it is plainly an "extraordinary" decision for Congress to interfere with such a central element of state self-government.

Indeed, respondents themselves claim to have found only *one* other instance where Congress has allegedly interfered similarly in the States' absolute control over their subdivisions. *See* Resp. Br. 25 (citing *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985)). By itself, that fact is telling. If it were in fact not an "extraordinary" thing for Congress to tell States whether they can exercise control over their political subdivisions, one would expect to find more than a single alleged example of such actions in more than two centuries of congressional enactments.

Moreover, even respondents' lone example turns out not to be analogous to this case. *Lawrence County* involved a dispute over the interpretation of language in a statute authorizing the spending of *federal* money. *See* 469 U.S. at 257-58; Resp. Br. 30 n.12 (conceding in a footnote that *Lawrence County* "involved a federal grant program, enacted under the Spending Clause"). It is a far different thing for Congress to place conditions on the spending of federal money than to

limit the inherent powers that the States possess separate and apart from any federal authorization. *See, e.g., New York v. United States*, 505 U.S. 144, 157 (1992) (discussing how Tenth Amendment limitations on federal power generally are not implicated by congressional action under the Spending Clause).[1]

4. Because this Court's cases establish that it is in fact an extraordinary action for Congress to infringe on States' sovereignty interest to exercise absolute discretion over the powers granted to their subdivisions, there is no merit to respondents' claim that *Gregory*'s rule is somehow weaker or inapplicable here. *See* Resp. Br. 25-33.

Respondents rely primarily on *City of Columbus* and *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), in suggesting that the Court should employ the "usual methods of statutory interpretation" and not any plain-statement rule in this case. Resp. Br. 25. Respondents' reliance on these cases is misplaced.

In fact, *City of Columbus* specifically emphasizes States' sovereignty interest in determining the powers of their subdivisions. *See* 536 U.S. at 437. Even more to the point, the Court stressed there that, "*[a]bsent a clear statement to the contrary*, Congress' reference to the 'regulatory authority of the State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." *Id.* at 428-29 (emphasis added). Respondents notably ignore that language. Similarly, in *Mortier*, the Court emphasized States' authority to control their

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[1] Moreover, contrary to respondents' footnote argument (*see* Resp. Br. 30 n.12), *Lawrence County* did not involve a condition on federal funds that would trigger the plain-statement rule of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). In *Pennhurst*, the Court faced an argument that States that accepted federal funds would be subject to private rights of action, and it required a clear statement of intent to support that. *See id.* at 15-17. In *Lawrence County*, the statute did not place a condition on the use of federal funds; the question was whether the State could pass a law imposing such conditions, and thus intercede in the federal program. *See* 469 U.S. at 258-59.

subdivisions and read the relevant statute to be consistent with that long-established rule. *See* 501 U.S. at 607-08. And the Court's holding there – which read the federal statute to respect such state prerogatives – certainly does not support respondents' position.

Additionally, neither *Mortier* nor *City of Columbus* involved a federal statute that allegedly preempted a state law allocating responsibilities among political subdivisions (or refusing to do so). If, for instance, Wisconsin passed a statute requiring that all pesticide regulation should be done by the State itself – which is the proper analogy to this case – there is nothing in *Mortier* or *City of Columbus* that indicates that the Court would have found federal law to have preempted that choice, or that the Court would have refused to apply the *Gregory* plain-statement rule to determine whether Congress intended to override that state legislative judgment as to the operations of its own government.[2]

B. The Legislative History of Section 253(a) Confirms that Congress Did Not Intend To Strip States of Their Historic Power To Control Their Political Subdivisions

Respondents also contend that the legislative history of section 253 demonstrates that Congress intended that provi-

[2] Respondents take issue with our contention that, read as respondents urge, section 253(a) also raises significant constitutional concerns that the Court should avoid absent a plain statement. *See* SWBT Br. 15 n.10. In particular, respondents claim that their interpretation of section 253(a) does not implicate the Tenth Amendment by conscripting the States to implement the federal regime because it merely "requires the States only to *refrain* from enacting anti-competitive barriers to entry." Resp. Br. 33. That assertion is incorrect. In fact, section 253(a) requires the States, through their subdivisions – the "'convenient agencies'" over which the State, as a matter of federal law, has absolute control, *City of Columbus*, 536 U.S. at 437 (quoting *Mortier*, 501 U.S. at 607-08) – to participate affirmatively in the federal scheme for injecting competition into local markets, regardless of whether the States agree with that policy. *Cf.* 47 U.S.C. § 252(e)(5) (authorizing States to opt out of implementation of the 1996 Act without penalty).

sion to deprive States of their authority to control the activities of their political subdivisions. That claim is inaccurate.

As an initial matter, even if the legislative history supported respondents' theory, that would not aid their cause. As this Court explained in *Gregory* itself, and as we discussed in our opening brief (at 20 n.12), the plain statement required here must be in the *text* of the statute – it must be "plain to anyone reading the Act" that it impinges on the relevant state prerogative. 501 U.S. at 467. Accordingly, even if the legislative history tilted in respondents' direction, it would be irrelevant.

In fact, however, the legislative history weighs strongly against respondents' arguments. The most significant legislative history on this issue comes in the very first sentence of the authoritative Joint Explanatory Statement of the Committee of Conference, which reflects the views of the legislators who negotiated the text of the ultimate bill that became the 1996 Act. In that first sentence, the Conference Committee made clear their understanding that the 1996 Act was designed "to accelerate . . . *private sector* deployment of advanced telecommunications." S. Conf. Rep. No. 104-230, at 113. Respondents are notably silent about that language, which we highlighted in our opening brief (at 17) and which is surely the most relevant legislative history as to Congress's intent.[3]

[3] Statements by Senator Pressler, a lead Senate Manager of the bill, and other legislators reiterate this point. *See, e.g.*, 141 Cong. Rec. S7890 (June 7, 1995) (Sen. Pressler) ("The bill is designed to rapidly accelerate private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."); *id.* at S7967 (June 9, 1995) (Sen. Craig) ("First, and foremost, it is important that we do not lose sight of the ultimate goal of reforming the 1934 act, which should be to establish a national policy framework that will accelerate the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."); *id.* at S8413 (June 14, 1995) (Sen. Rockefeller) ("The idea is the Federal Government no longer needs to micromanage who can provide what kind of service to America's households and to America's

Moreover, the reason that Congress focused on private sector competition was that the 1996 Act's major innovation was to allow private companies to enter into local telecommunications. Congress had little reason to preempt state experimentation as to the different and thorny issues raised by municipal entry into local telecommunications markets because, as respondents do not dispute, hardly any municipalities offered telecommunications in 1996. *See* SWBT Br. 18.[4]

For this reason, for all their digging, respondents have not found a single instance where the authoritative Conference Report, any other House or Senate report, or even a single Senator or Representative indicated that Congress's intent was to supercede state laws barring political subdivisions from providing telecommunications services. Indeed, respondents have not even found any instance where Congress noted the existence of such state laws, much less have they demonstrated that Congress affirmatively considered the

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businesses; that, as technology develops to give Americans incredible choices and incredible opportunities from the basics of telephone service to the endless possibilities of computers, the private sector should be able to compete for customers, for business and for profits."); *id.* at H4522 (May 3, 1995) (Rep. Barton) ("If we can create a fair marketplace for telecommunication services, the industry, through competition, will create the much-touted information superhighway in a less expensive and more efficient fashion.").

[4] Contrary to respondents' claim (at 13), this does not mean that Congress should have simply preempted exclusive-franchise laws. Congress understood that a variety of laws that fell short of exclusive franchises could have the "effect" of prohibiting the ability of a private entrant to compete. *See, e.g.*, Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3497-98, ¶¶ 76-78 (1997) (concluding that section 253(a) preempted Texas's requirement that all telecommunications carriers deploy physical facilities sufficient to serve a minimum geographic area, because such a "build-out requirement" compelled competitive carriers to provide service in a particular manner and precluded their ability to provide service exclusively through resale or by leasing facilities from the incumbent provider).

effect of the proposed federal statute on such laws and nevertheless affirmatively decided to override them.

Because no such evidence exists, respondents are reduced to arguing (at 18-19) that the use of the word "utilities" in the committee report somehow shows that Congress affirmatively intended to override state laws limiting the provision of telecommunications services by *municipalities*. Municipalities and utilities are plainly different things, however, and, if anything, the reference to "utilities" reinforces the idea that Congress anticipated that the "private sector" would enter local telecommunications markets and compete for customers. The overwhelming majority of power in this country is provided by private, not public, utilities. Indeed, only about 13.7% of power is generated by publicly owned providers; just 14.6% of consumers are served by such companies. *See* American Public Power Ass'n, *2003 Annual Directory & Statistical Report* at 13, 14.

Accordingly, just as Congress stressed the fact that "meaningful facilities-based competition is possible" because *private* cable operators such as "Time Warner" and "Jones Intercable" had facilities serving 95% of homes and were poised to compete, S. Conf. Rep. No. 104-230, at 148, Congress's references to "utilities" in no way demonstrates an intent – much less an unmistakably clear intent – to strip States of their historic authority to control the actions of their political subdivisions. In any event, as respondents acknowledge (at 34-36), the FCC has interpreted the statute only to preserve state laws that prevent political subdivisions from offering telecommunications; it has not concluded that any utility that has some form of "public ownership" may be barred from offering telecommunications. *See* SWBT Pet. App. 14a.[5]

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[5] Although respondents claim that the FCC's decision creates "anomalies," Resp. Br. 34, it is far from unusual for the FCC or other expert agencies to have to make line-drawing judgments as to the scope of an ambiguous congressional enactment. Section 253(a), which speaks of state regulations that have the "effect" of prohibiting the "ability" of "entities" to offer telecommunications services, plainly anticipated that

Contrary to respondents' argument, Congress's amendment of the Pole Attachments Act, 47 U.S.C. § 224, demonstrates nothing about Congress's intent in section 253. The "utilities" subject to section 224 are not companies that offer telecommunications; rather, they are companies (such as power and cable companies) that own poles and other facilities to which telephone lines must be attached. *See* 47 U.S.C. § 224(a)(1) (defining a "utility" for these purposes as anyone that "owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications"). A congressional acknowledgment that public bodies may own poles does nothing to show that Congress anticipated that municipalities would provide telecommunications or, more to the point, that they could do so even where an otherwise-valid state law prohibited such activities.

Finally, respondents cite a statement by a single legislator (Sen. Lott) at a *hearing* held during a different Congress two years before the 1996 Act was passed. *See* Resp. Br. 21. Even if this single statement helped respondents, it would be an extraordinarily thin reed on which to rest any conclusion about congressional intent. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (noting that the Court has "eschewed reliance on the passing comments of one Member [of Congress]"). In any event, the context of this lone statement does not support respondents' argument. Senator Lott spoke after the statement of the chairman of a *private* utility (Southern Company Services) who talked about the need to amend what was then section 302(b) of the proposed bill, *see* S. Rep. No. 103-367, at 163 (1994), which dealt with the Public Utility Holding Company Act of 1935. *See The Communications*

such line-drawing would be necessary, and thus gave the FCC the authority to make case-by-case determinations of preemption. *See* 47 U.S.C. § 253(d). This does not mean, as respondents allege (at 35), that the scope of section 253(a) depends on state law, but only that substantively different state prohibitions may be treated differently under section 253. Indeed, respondents themselves ultimately concede that distinctions between political subdivisions and utilities that have a separate existence can be drawn. *See* Resp. Br. 36.

Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 369-77 (1994). Senator Lott's statement about the need to "make sure we have got the right language to accomplish what we wish accomplished," *id.* at 379, is thus best understood to reflect the issue about the language in section 302(b) of the draft bill, which has nothing to do with the scope of what ultimately became section 253(a). Respondents' argument on this point ignores these facts and is thus misguided.

C. Respondents' Policy Arguments Provide No Support for Their Position

Respondents argue that there are "compelling" reasons that municipal entry would enhance telecommunications competition and that three Commissioners of the FCC expressed the view that States should use mechanisms other than bans to address the issues of cross-subsidization and unfair competition that municipal entry raises. *See* Resp. Br. 15-17. Respondents' *amici* make similar arguments.[6]

The merits of these arguments are subject to substantial debate, and there are significant reasons to think that it is dubious economic policy to permit municipalities and other political subdivisions to compete with the private companies that they regulate. *See, e.g.*, United States Telecom Ass'n *et al. Amicus* Br. 15-24. Moreover, even aside from economics, States may legitimately decide as a political matter that they wish their instrumentalities to steer clear of private markets.

In the end, however, the Court need not enter such debates. As we have emphasized, the whole point of the *Gregory* principle is to ensure that policy decisions affecting "traditionally sensitive areas," *Raygor*, 534 U.S. at 543 (internal quotation marks omitted), including the "structure of [state] government," *Gregory*, 501 U.S. at 460, are made by responsible *legislators*, not by agencies and courts trying to divine legislative intent where it is not unmistakably clear. In most cases, those determinations are to be made by state represen-

[6] *See, e.g.*, Knology *Amicus* Br.; High Tech Broadband Coalition *et al. Amicus* Br.; Consumer Fed'n of America *Amicus* Br.

tatives, who, as this Court has stressed, are free to experiment with different solutions, including both the path that Missouri has followed and the alternative paths proposed by respondents and their *amici* and adopted in other States. *See id.* at 458. Alternatively, where Congress has considered the specific issue and spoken directly to it, such matters may be decided by the federal legislature. Because that has not occurred here, it is the Missouri Legislature's prerogative to follow the path that it believes is best suited for the people of that State.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, ATTORNEY GENERAL OF MISSOURI, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preserves or preempts the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

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PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint has substantial local, long distance, and wireless telephony operations throughout the United States. Several Sprint subsidiaries are incumbent local exchange carriers ("ILECs") serving approximately eight million local access lines in predominantly rural communities of eighteen states, including more than 250,000 local access lines in Missouri. Other Sprint subsidiaries offer nationwide wireless and long distance services, and provide competitive local exchange service in more than thirty states.

Sprint's customer, employee, and shareholder constituencies are vitally interested in this case. The question presented asks whether Section 253(a) of the Telecommunications Act of 1996 (the "1996 Act") preserves or preempts the power of the States to prohibit their political subdivisions from entering local telecommunications markets. Without meaningful state control, market entry by political subdivisions into this complex, volatile industry creates significant risks to taxpayers, who are forced to subsidize the ventures, impedes effective competition, and harms the employees and shareholders of private sector companies like Sprint that have invested in local communities. The D.C. Circuit and the FCC have construed Section 253(a) to preserve state authority in this important area. Their decisions are consistent with the statutory language and structure, and promote the pro-

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[1] Sprint's brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

competitive objectives of Congress. The Eighth Circuit, however, has construed Section 253(a) to preempt state authority and thereby abdicate to each municipality the decision whether to enter local telecommunications markets, regardless of any statewide public policy or competitive market concerns. This construction of the statute undermines effective competition and seriously threatens Sprint's investments and interests in Missouri and other states.

SUMMARY OF ARGUMENT

The Eighth Circuit's construction of Section 253(a) cannot be squared with the pro-competitive purposes of the 1996 Act or the central role that Congress gave to the States in implementing the Act's requirements. Congress gave the States significant new powers to ensure a level playing field for competition in local telecommunications markets and to prevent discriminatory and other anti-competitive practices by individual competitors. There is no basis to presume that Congress intended to delegate such powers to the States over private competitors, but to preempt the States' traditional sovereign authority to control market entry by its own instrumentalities when necessary to protect the development of effective local competition.

The 1996 Act is designed to end monopoly control of local telecommunications markets and to promote fair competition for our nation's telecommunications services. Congress envisioned that such competition would stimulate increased investment in telecommunications and information technologies, reduce the need for government regulation, and ultimately improve services to consumers. Congress recognized that these goals could not be achieved if incumbent providers and other competitors were able to use cross-subsidies and discriminatory tactics to distort and impede effective local competition. The 1996 Act thus contains numerous proscriptions and reforms that are intended to

detect and eliminate cross-subsidization, prevent anti-competitive practices, and allow for fair competition.

Congress intended for the States to play a primary role in implementing the 1996 Act. The 1996 Act preserves many of the traditional regulatory powers of the States over local markets. It also delegates significant new powers to the States to help break monopoly control of local telecommunications markets and to ensure a level playing field for new entrants. Among other things, Congress empowered the States to arbitrate and approve "interconnection agreements," which set forth the terms and conditions under which new entrants may obtain non-discriminatory access to the network elements and services of ILECs; to prevent cross-subsidization of intrastate services; to propose new support mechanisms for universal service that replace implicit subsidies for rural customers (through inflated urban and business customer rates) with fair and explicit contributions from all telecommunications providers; and to verify to the FCC that any Bell operating company ("BOC") seeking approval to enter long distance markets has adequately opened its local markets to competition and is not engaging in cross-subsidization of its services or other discriminatory practices.

Municipal entry into intrastate telecommunications markets creates the same risks of improper cross-subsidization and anti-competitive practices that Congress sought to eliminate under the 1996 Act. While municipal entry into telecommunications markets to compete with incumbent and competitive providers may appear pro-competitive on its face, it certainly is not the type of competition envisioned by Congress. Municipalities are historically less efficient than private sector companies in providing competitive telecommunications services, yet they enjoy numerous financial, regulatory, and other advantages that are difficult if not impossible to quantify or regulate. For example, a municipality can subsidize its operations with taxes and other public revenues,

can issue tax-free debt, has superior access to public rights-of-way, and is not subject to the same profit expectations or accounting standards as a private company. These advantages enable municipalities to undercut private competitors in the provision of telecommunications services. If unchecked, therefore, government entry into local telecommunications markets can impede competition, deter private entrants, and undermine the purposes of the 1996 Act.

To protect against such harms, many states have chosen to prohibit their political subdivisions from providing local telecommunications services and have focused instead on promoting competition through traditional governmental actions such as tax incentives and regulatory reform. States that have permitted their political subdivisions to enter into local markets have become embroiled in extensive efforts to implement and enforce "level playing field" laws. These state laws attempt to limit the ability of government entrants to use tax subsidies and other advantages to undercut private competitors, and are similar in design and purpose to many provisions of the 1996 Act.

It would be surpassing strange for Congress to have given the States such a central role under the 1996 Act in preventing discriminatory, anti-competitive practices by private entrants, while at the same time preempting the States' authority to control market entry by their own political subdivisions to protect against the same potential harms. Such a result not only undermines the pro-competitive purposes of the 1996 Act, but, as Petitioners have fully addressed, significantly intrudes on the sovereign authority of the States.

The D.C. Circuit and the FCC correctly determined that the words "any entity" in Section 253(a) do not evince a plain and unmistakable intent by Congress to preempt the States' traditional authority over their political subdivisions. This interpretation comports with the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), (FCC Pet. App. at

7a), is consistent with the statutory scheme and structure, and promotes the pro-competitive purposes of the 1996 Act by preserving state control over government entry into local telecommunications markets. The Eighth Circuit, in contrast, has wrongly interpreted Section 253(a) to preempt the sovereign authority of the States over their political subdivisions in this vital area. The Eighth Circuit's ruling allows individual municipalities to enter local telecommunications businesses even when a state has determined that such entry will distort the marketplace and impede competition. This interpretation of Section 253(a) is inconsistent with the "plain statement" rule, improperly ignores the role that Congress gave to the States in preventing such harms in the local telecommunications markets, and cannot be squared with the structure and pro-competitive purposes of the 1996 Act.

ARGUMENT

I. THE 1996 ACT WAS DESIGNED TO ACHIEVE AN ORDERLY TRANSITION FROM LOCAL MONOPOLIES TO MARKET-BASED COMPETITION BY ENSURING A LEVEL PLAYING FIELD FOR NEW ENTRANTS.

Prior to 1996, local telecommunications markets were viewed as natural monopolies and were regulated by state commissions and the FCC to ensure that consumers paid just and reasonable rates for services. In enacting the 1996 Act, Congress sought to replace local monopolies with market-based competition that would enhance the level and quality of telecommunications services available to consumers. The 1996 Act was expressly designed "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new

telecommunications technologies." Telecommunications Act of 1996, 110 Stat. 56, 56 (1996).[2]

Congress recognized that these goals could not be achieved unless market participants were able to compete on a level playing field. As Senator Breaux explained:

> Competition is really what America is all about. And fair competition is what this committee and this Congress [are] charged with guaranteeing to all of the companies that are engaged in technology and technological development in this country. Some industries, however, I think insist on just a fair advantage as opposed to fair competition. And our job, of course, is to ensure fair competition for all.

Telecommunications Oversight: Hearings Before the Senate Comm. on Commerce, Science, and Transp., 104th Cong. (1995), *at* WL, A & P Telecom Hearings (13), at *14 (Jan. 9, 1995) (statement of Sen. Breaux, Member, Comm. on Commerce, Science, and Transp.). Accordingly, numerous provisions of the 1996 Act were designed to eliminate the ability of certain competitors to discriminate against other competitors (either in access to network facilities or in charges for underlying services) and to prevent cross-subsidization of services to undercut competition.[3]

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[2] *See also* S. 652, 104th Cong. (1995) ("AN ACT To provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes."); H.R. 1555, 104th Cong. (1995) ("A BILL To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[3] Congressional concerns about potential cross-subsidization animated the earliest proposals for telecommunications legislation. *See, e.g.*, S. 1822, 103d Cong. § 234 (1994), *at* WL, A & P Sen. 1822

Section 251(c), for example, imposes several duties on ILECs in order to open their markets to competition. Among other things, an ILEC must permit new entrants to "interconnect" their facilities and equipment with the ILEC's network; provide unbundled access to certain of its network elements; and offer its retail telecommunications services to new entrants for resale at wholesale rates. 47 U.S.C. § 251(c)(2)-(4). In each case, the terms and conditions under which such access and services are provided must be "just, reasonable, and nondiscriminatory." *Id.* Congress also included a "most favored nation" provision, Section 252(i), which requires "[a] local exchange carrier [to] make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." *Id.* § 252(i). And Congress authorized state commissions to reject any interconnection agreement negotiated by a BOC and another carrier that "discriminates against a telecommunications carrier not a party to the agreement." *Id.* § 252(e)(2)(A)(i).

In addition to the general duties imposed on ILECs under Sections 251 and 252, Congress enacted specific provisions

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("PREVENTION OF CROSS SUBSIDIES.—In addition to regulations on cross-subsidization that are prescribed under other provisions of this Act, the Commission shall prescribe cost allocation regulations to prevent any Bell operating company or affiliate that offers services that have market power from using revenues from such services to subsidize competitive information services."); H.R. Rep. No. 103-560 § 101 (1994), *at* WL, A & P H.R. Rep. 103-560 (Jan. 9, 1995) ("The prevention of such cross-subsidization shall ensure that telephone rates for basic service reflect only the cost of providing such service, and shall further ensure that as quality telecommunications technology is deployed in both urban and rural areas future cost efficiencies are reflected in those rates.") (accompanying H.R. 3636, 103d Cong. (1994) (the "National Communications Competition and Information Infrastructure Act of 1994")).

designed to prevent the BOCs (and, in some cases, other ILECs), from cross-subsidizing their services and discriminating against new entrants.[4] For example, Section 271 prohibits the BOCs from offering long distance services until they have demonstrated that their local markets are adequately opened to competition. *See generally id.* § 271(a)-(c) (prohibiting BOC provision of interLATA services unless certified by the FCC that a BOC has met the "competitive checklist"). This includes a showing by the BOCs that new entrants have been offered interconnection, access to network elements, and resale services on "just," "reasonable," and "nondiscriminatory" terms, as required under Sections 251 and 252. *See id.* §§ 251(c), 252(d).

Once a BOC obtains approval to offer long distance services, Section 272 further requires that such services only be offered through a separate affiliate. Congress imposed this requirement to "discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate." *In re Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Minn.*, Memorandum Opinion & Order, WC Docket No. 03-90, 2003 FCC LEXIS 3549, at *85 (¶ 62) (June 26, 2003) ("*Qwest Application*").[5] The affiliate must operate independently from the

[4] *See, e.g., In re Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996*, Report & Order, 11 F.C.C.R. 17,539, 17,556 (¶ 39) (1996) ("Sections 260, 271, 274, 275 and 276 of the Communications Act of 1934 all expressly prohibit BOCs, and in some cases, other incumbent local exchange carriers from subsidizing services permitted under those sections from their 'telephone exchange service' or their 'basic telephone service.' . . . In addition, section 273(g) states that the Commission may prescribe such additional rules and regulations as may be necessary to prevent cross-subsidization.").

[5] In rejecting a First Amendment challenge to Section 272, the Commission noted: "Certainly Congress's interest in managing an orderly transition to competition in the local markets is an important one. Section 272, like section 274, [which the D.C. Circuit upheld against a First Amendment challenge,] advances that goal by discouraging discrimination and cross-subsidization by the BOCs." *In re Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion & Order, 14 F.C.C.R. 16,252, 16,284 (¶ 59) (1999) (citing *BellSouth Corp. v. FCC*, 144 F.3d 58, 69-70 (D.C. Cir. 1998)). *See also Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *300 (May 11, 1995) (statement of Lisa Rosenblum, Deputy Chairman, New York Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners) ("During the transition to a competitive market, it is essential that regulators and competitors are able to detect improper cross subsidization or discriminatory practices. A separate subsidiary requirement would make it easier to detect these practices.").

BOC; maintain separate books and records; have separate officers, directors, and employees; and "conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis." 47 U.S.C. § 272(b)(5).[6] Congress also expressly prohibited the BOC and its affiliate from discriminating against competitors in the offering and provision of services. *See id.* § 272(e).

Congress included similar safeguards in the 1996 Act governing the BOCs' manufacturing, electronic publishing, and alarm monitoring activities. *See id.* § 273 (manufacturing),[7]

[6] Section 272(f) contains a "sunset" provision for the separate affiliate requirements, unless the FCC determines to extend the period. 47 U.S.C. § 272(f).

[7] A BOC authorized to enter the equipment market must do so through a separate subsidiary, *see* 47 U.S.C. § 273(d)(3), and the FCC is charged with "prescrib[ing] such additional rules and regulations as the Commission determines are necessary to . . . prevent discrimination and cross-subsidization in a [BOC's] dealings with its affiliate and with third parties," *id.* § 273(g).

§ 274 (electronic publishing),[8] § 275 (alarm monitoring).[9] These provisions, like Sections 271 and 272, were intended to prevent cross-subsidization and discrimination by requiring the BOCs to offer such services only through separate affiliates and on equal terms and conditions to competitors.

As a further part of "leveling the playing field" for competition, the 1996 Act mandated that federal support for "universal service" be explicit. During the monopoly era, ILECs were permitted to subsidize the cost of providing service to high-cost (*e.g.*, residential and rural) customers by charging inflated rates to toll and business users. The 1996 Act's new model for market-based rates made this approach unsustainable. *See* H.R. Rep. No. 104-204, at 68 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 33 (the Act "make[s] such internal subsidies much less viable because deregulation would remove the near-guaranteed returns allowed in a regulated market, and with them the ability of the regulated firm to subsidize high-cost customers"). Section 254 thus requires the FCC to establish new support mechanisms for universal service that are "explicit and sufficient," 47 U.S.C. § 254(e), funded by *all* telecommunications carriers providing interstate telecommunications services, *see id.* § 254(d), and available to any eligible telecommunications carrier, *see id.* § 254(e).

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[8] Section 274 similarly prohibits the separate affiliates and their respective BOCs from cross-subsidizing services. *See id.* § 274(b)(4) (noting that a separate affiliate and its BOC must value assets and keep records of asset transfers "in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies").

[9] Section 275 requires an ILEC engaged in the provision of alarm monitoring services to: "(1) provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions; and (2) not subsidize its alarm monitoring services either directly or indirectly from telephone exchange service operations." *Id.* § 275(b)(1)-(2).

By eliminating implicit subsidies and creating a new framework for universal service, Congress again sought to level the playing field and remove any competitive disadvantages resulting from the old framework. Indeed, in Section 254(k), Congress made clear its aversion to *any* form of rate subsidization under the new competitive regime, expressly providing that:

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

Id. § 254(k).

The 1996 Act thus dramatically changed the landscape of telecommunications. Congress mandated that local telecommunications markets transition quickly from a single provider subsidizing its services to certain customers with implicit subsidy flows from other groups of customers, to multiple providers operating on a level playing field and offering services at market-based rates. Pursuant to this mandate, the FCC has taken steps to remove such cross-subsidies so that Congress' twin goals of effective competition and universal service can coexist. As more fully shown below, municipal entry into local telecommunications markets creates similar risks of cross-subsidization and discrimination. State laws prohibiting municipal entry, like the Missouri statute overturned by the Eighth Circuit, are thus designed to protect against the very same market distortions that the 1996 Act sought to eliminate. Preserving such laws is not only con-

sistent with—but indeed critically necessary to ensure—the growth of efficient, market-based competition as envisioned by Congress.

II. CONGRESS EXPECTED THE STATES TO PLAY A CENTRAL ROLE IN IMPLEMENTING THE 1996 ACT AND DELEGATED SIGNIFICANT NEW POWERS TO THEM TO HELP ENSURE A LEVEL PLAYING FIELD FOR COMPETITION.

States have historically played the primary role in regulating intrastate telecommunications markets. The 1996 Act preserves much of this traditional authority and delegates significant new powers to the States to help implement the pro-competitive objectives of Congress. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 412 (1999) (Breyer, J., concurring in part and dissenting in part) ("When, in 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating such service."). Removing the States' ability to prohibit their political subdivisions from entering into the field, as the Eighth Circuit's decision has done, is contrary to the role given the States by Congress in the 1996 Act.

As a general matter, Congress expressly preserved the States' authority to "establish[] access and interconnection obligations of local exchange carriers" that are additional to and consistent with the requirements of the 1996 Act. 47 U.S.C. § 251(d)(3)(A). Congress also preserved the States' authority to establish and enforce other regulations, "including requiring compliance with intrastate telecommunications service quality standards or requirements." *Id.* § 252(e)(3). In Section 253(b) and (c), Congress similarly preserved the authority of the States to impose reasonable, competitively neutral requirements for universal service, protection of the

public safety and welfare, service quality, and management of public rights-of-way. *Id.* § 253(b)-(c).

In addition to preserving these traditional powers, the 1996 Act delegated broad new authority to the States. Section 252 empowers the States to arbitrate and approve the interconnection agreements under which ILECs and new entrants compete for local services. *See id.* § 252(b)-(e). The States are authorized to impose terms and conditions that are "just," "reasonable," and "nondiscriminatory," to reject negotiated agreements that provide preferential treatment to a new entrant or are otherwise "not consistent with the public interest, convenience, and necessity," *id.* § 252(e)(2)(A)(ii), and to adjudicate any disputes arising from approved agreements.

The FCC has described the States' expanded role under these provisions as follows:

> State commissions will continue to exercise primary authority to arbitrate and approve interconnection agreements, and will continue to exercise concurrent authority to adjudicate interconnection and unbundling disputes arising from interconnection agreements. Thus, the state commissions' roles in arbitrating and enforcing the requirements of interconnection agreements will remain central, as Congress intended.

In re Core Communications, Inc. v. Verizon Md. Inc., Memorandum Opinion & Order, 18 F.C.C.R. 7962, 7972 (¶ 26) (2003).[10] The Eighth Circuit has similarly recognized that state commissions have the primary authority under federal

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[10] *See also In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report & Order, 14 F.C.C.R. 20,912, 20,982 (¶ 158) (1999) ("We believe that the rules and guidelines set out in this order are consistent with Congress' vision of the complementary roles for the Commission and the states with respect to access to unbundled network elements under section 251 of the Act[.]"); *id.* at 20,983-85 (¶¶ 162-168) (describing the "States' Role in Fostering Local Competition under Sections 251 and 252").

law to enforce the substantive terms of interconnection agreements, holding that "the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). And in its recent *Triennial Review Order*, the FCC confirmed the continuing, primary role of the States in making the granular analysis required to determine whether certain network elements must be provided on an unbundled basis to competitors under Sections 251 and 252 of the 1996 Act. *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report & Order on Remand, CC Docket No. 01-338 *et al.*, 2003 FCC LEXIS 4697, at *296, *305-*313 (¶¶ 186, 191-196) (Aug. 21, 2003) ("*Triennial Review Order*"). In particular, the FCC stated:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

Id. at *305 (¶ 192).[11] Although this recent order involved a different statutory provision from the one at issue here, the

[11] In response to commenters who suggested that States can ignore federal law and unbundle at will under state law, the FCC found that the States must comport with the federal regulatory regime and may not regulate in a manner that thwarts it. *Triennial Review Order*, 2003 FCC LEXIS 4697, at *305-*309 (¶¶ 192-193). As more fully shown *infra* Part III, state laws restricting municipal competition advance fair, subsidy-free competition and are consistent with the federal regulatory regime.

FCC's preemption analysis further confirms the central role that Congress intended for the States to play in implementing the local competition provisions of the 1996 Act.

Congress also intended for the States to play a vital role with respect to BOC entry into the long-distance services market. Under Section 271, the FCC must "consult with the State commission of any State that is the subject of [a BOC's] application in order to verify the compliance of the [BOC] with the [competitive checklist]."[12] 47 U.S.C. § 271(d)(2)(B). "As the Commission has repeatedly recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purposes of the Act serve a vitally important role in section 271 proceedings." *Qwest Application*, 2003 FCC LEXIS 3549, at *2 (¶ 2).[13] The 1996 Act thus effectively assigns an initial "gatekeeper" function for BOC entry to the States, which must verify that the level playing field conditions envisioned by Congress have been

[12] In a hearing before the House, then FCC Chairman Reed Hundt described the federal and state roles under Section 271 stating: "Each State would have the obligation and the opportunity to verify compliance with the checklist. . . . Then, subsequent to that, the FCC would have a final verification process that is fairly compressed in time, in fact, extremely compressed in time, but that gives us assurance in the nature of review—a substantive review that the compliance process at the State level has been full and fair." *Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *290 (May 11, 1995) (statement of Reed Hundt, Chairman, FCC); *see Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *323 (May 11, 1995) (statement of Rep. Jack Fields, Member, House Comm. on Commerce) (noting that the House "felt it was very important that the States have a role" under Section 271).

[13] *See In re Verizon Pa. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pa.*, Memorandum Opinion & Order, 16 F.C.C.R. 17,419 (2001) (same).

adequately achieved in the relevant market. The FCC has also encouraged the States to adopt creative enforcement schemes to ensure that a BOC's activities after entry into the long distance market in a particular state continue to comply with the pro-competitive requirements of the Act. *See In re Application of Verizon N.Y. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Conn.*, Memorandum Opinion & Order, 16 F.C.C.R. 14,147, 14,181 (¶ 76) (2001) (noting that "Verizon's Performance Assurance Plan (or PAP) for Connecticut provides additional assurance that the local market will remain open after Verizon receives section 271 authorization").

Similarly, with respect to universal service, Congress not only preserved the States' authority to adopt universal service requirements for intrastate services, 47 U.S.C. § 254(f), but also established a "Federal-State Joint Board" on Universal Service, so that the States could participate in the development and adoption of universal service rules for interstate services, *see id.* § 254(a)(1). As noted, Congress made clear that the new support mechanisms established by the States and the FCC must eliminate any subsidization of competitive services. *Id.* § 254(k). In addition, Congress authorized the States to designate which carriers are eligible to receive universal service support under the new mechanisms. *See id.* § 254(e).

Although Congress granted these broad new powers to the States, it recognized—consistent with traditional notions of federalism—that it could not force a state to exercise such authority. *Cf. Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 640, 645 (2002) (discussing voluntary nature of States' participation in the regulatory scheme established under the 1996 Act). Section 252(e)(5) thus requires the FCC to preempt a State's jurisdiction to exercise these powers whenever the State chooses for any reason not to act. *See* 47 U.S.C. § 252(e)(5); *Triennial Review Order*,

2003 FCC LEXIS 4697, at *304 (¶ 190) ("If a state commission fails to perform the granular inquiry we delegate to them, any aggrieved party may petition [the FCC] to step into the state's role.").

Thus, the courts, including the Eighth Circuit, and the FCC have recognized the crucial role of the States in opening local telecommunications markets to competition and protecting against discriminatory and anti-competitive practices. Interpreting Section 253(a) to preempt state authority to control entry by their political subdivisions into these markets, as the Eighth Circuit has done, cannot be reconciled with the powers Congress gave to the States under the 1996 Act.

III. MUNICIPAL ENTRY INTO LOCAL TELECOMMUNICATIONS BUSINESSES CREATES THE SAME RISKS OF CROSS-SUBSIDIZATION AND UNFAIR COMPETITION THAT CONGRESS SOUGHT TO ELIMINATE UNDER THE 1996 ACT.

Since 1996, an increasing number of municipalities and other state political subdivisions have entered the market for telecommunications services, including local phone, cable, and Internet services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 6-11 & Table 2, *at* http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (Jan. 2001) ("*Telecom Business*"). These government forays into telecommunications businesses have created the same risks of cross-subsidization of rates and discriminatory practices that Congress sought to eliminate under the 1996 Act.

A. Government Providers Are Historically Less Efficient Than Private Providers, But Can Undercut Competition Through The Use Of Public Subsidies And Other Inherent Advantages.

Municipalities and other state political subdivisions are historically less efficient than their private sector counterparts

in providing competitive services.[14] In order to compensate for this inefficiency, government market participants often rely on a slate of regulatory and economic advantages that are not available to their private competitors. For example, municipalities are able to cross-subsidize their telecommunications offerings in numerous ways. Revenues generated through local taxes and fees are often used to help fund these "competitive" ventures.[15] Municipalities can also issue tax-free debt to support their operations.[16] In addition to these

[14] *See, e.g.*, Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 657 (3d ed. 2000) ("Often, government owned firms are less efficient than privately owned firms. Managers have less of an incentive to maximize profits under public ownership."); 2 Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 328 (1998) (discussing the "virtual disappearance" of government ownership as an endorsement of private organization); N. Gregory Mankiw, *Principles of Microeconomics* 333 (2d ed. 2001) ("Put simply, as a way of ensuring that firms are well run, the voting booth is less reliable than the profit motive."); Joseph Stiglitz, *Whither Socialism* 237 (MIT Press 1994) ("[T]he popular prejudice is, by and large, correct: *Private sector activities, while not necessarily more efficient, are on average so.*" (emphasis in original)); James Q. Wilson, *Bureaucracy* 227 (Basis Books 1989); *Telecom Business* at 12. The global trend toward privatization in telecommunications services further attests to this broad consensus.

[15] The City of Lebanon, Ohio, for example, charges developers of new houses a "Broadband Connection Fee" of $1,250 to subsidize its deployment of a fiber optic network, regardless of whether the homeowner ever subscribes to the City's broadband services. *See Home Builders Ass'n. of Dayton & Miami Valley v. City of Lebanon, Ohio*, Case No. 02CV59491 (Common Pleas Ct., Warren County, Ohio). Sprint and other private competitors have no ability to raise capital through such "fees" in deploying their networks.

[16] For instance, the City of Bristol, Virginia recently announced a $48 million bond offering, at least $11 million of which is earmarked for its local cable and telecommunications system. *See* Mike Still, *Bristol Virginia City Council Gives Blessing to $48.2 Million Bond Issue Plan, at* http://www.bristolnews.com/servlet/Satellite?pagename=BHC%2FMGArticle%2FBHC_BasicArticle&c=MGArticle&cid=1031768984728&path=!news (Mar. 26, 2003).

direct public subsidies, municipalities enjoy other significant advantages over private competitors. A municipality typically has preferential access to essential public rights-of-way, is exempt from local franchise fees and taxes, and is not subject to the same profit expectations or accounting standards as its private counterparts. *See Telecom Business* at 15.

Government entrants thus lack the normal market incentives to make effective business decisions and are particularly ill-suited to manage competitive operations that involve the kind of advanced technologies and rapid innovations found in the telecommunications industry. *Id.* at 12. Even so, the public subsidies and other advantages available to government entrants enable them to undercut private competitors in the provision of local telecommunications services. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers*, 95 Nw. U. L. Rev. 1099 (2001). Residential and business subscribers do not benefit from the "lower" rates offered by a government entity, however, since they have already subsidized the costs of providing the services through their local taxes. *See* Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, at 3, Progress & Freedom Foundation, *at* www.pff.org/publications/pop9.7guppyclick.pdf (Feb. 2002) ("*Government Entry*"). Private carriers like Sprint, who have spent billions of dollars in building their local networks, are similarly forced to subsidize these "competitive" government operations through the payment of property taxes on their facilities, as well as various franchise fees, pole attachment fees, and rights-of-way fees.

The inequities created by government entry into local telecommunications markets reduce the incentives for Sprint and other private carriers to invest in new infrastructure and technologies. Government entry likewise deters other private

sector companies from attempting to compete in local markets. These private companies often have legitimate competitive advantages, such as technological advances or greater efficiencies, but cannot compete with the publicly-funded government provider. This problem is particularly acute in telecommunications, where attaining sufficient scale is key to any competitor's survival. Government entry into these local markets, therefore, creates an "uneven playing field" and impedes the deployment of advanced telecommunications and information services by the private sector, thus undermining a primary objective of the 1996 Act. *See* 47 U.S.C. § 157(a).

Apart from the public subsidies and other advantages available to government entrants, their companion role as regulators affords numerous opportunities to discriminate against private competitors. *See Telecom Business* at 15. For example, municipalities have the authority to grant licenses and franchises. This puts the government provider in a position to forestall the entrance of new competitors. Even if access to inputs is ultimately granted, local franchising authorities routinely exact significant fees for use of public rights-of-way. While federal law may set a cap on these "access" fees, many local governments bypass these limits by demanding that carriers also contribute conduit or other facilities for the city's use.[17] The private new entrant is thus forced to build network facilities for and subsidize its potential competitor, the city, by regulatory fiat, providing yet another advantage to the government entrant. Further, within

[17] Some local franchising authorities, for instance, require cable operators to provide the local government with extra conduit, a dedicated network, and, in some cases, a public programming channel as conditions of the franchise. *See, e.g.*, License Agreement between Cablevision One of Boston, Inc. and Thomas M. Menino §§ 6.2, 6.5, 6.7, 6.8, 6.12, *at* http://www.cityofboston.gov/cable/pdfs/agreement.pdf; First Amendment to License Agreement between Media One of New York, Inc. and Thomas M. Menino § 6.11, *at* http://www.cityofboston.gov/cable/pdfs/amend.pdf.

certain bounds, local governments have the authority to terminate licenses and franchises, which provides considerable leverage when dealing with private competitors. *See also* David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises* (Working Paper 99-11), at 1-2 (AEI-Brookings Institute Joint Center for Regulatory Studies Nov. 1999) (generally finding that public enterprises "have stronger incentives than profit-maximizing firms to pursue activities that disadvantage competitors").

A similar advantage exists in the ability of local governments to favor their own telecommunications businesses by subjecting them to fewer, or more favorable, regulations. The City of Bristol, which offers local telecommunications services as the Bristol Virginia Utilities Board ("BVUB"), provides a prime example. Unlike Sprint and other private sector ILECs, BVUB has no "carrier of last resort" duties, which obligate a carrier to serve any customer within a specified territory who requests local telecommunications services.[18] BVUB can thus choose to serve only the more profitable government, business, and high volume residential customers, leaving to Sprint the burden of providing services to high cost, low volume (often rural) customers. Exempting government providers from the "carrier of last resort" obligations imposed on private sector companies is indeed ironic. Government, which usually occupies the role of providing services where competitive markets fail, here takes the role of the competitor "cherry picking" the best customers while the private providers must serve all customers who request service, no matter the cost of such service.

[18] *See* Letter from BVUB Counsel to Virginia State Corporation Commission of July 8, 2002 (amending BVUB's Application for Certificate in Case No. PUC-2002-00126); Order Granting Certificate, Case No. PUC-2002-00126 (Va. State Corp. Comm'n Nov. 26, 2002).

B. Most Government Entry Into Competitive Local Telecommunications Markets Fails, At Significant Cost To Private Entrants And Consumers.

Despite the inherent advantages enjoyed by government entrants, experience to date shows that government-run telecommunications businesses have failed to provide the promised public benefits and economic efficiencies. *See, e.g.*, Ronald J. Rizzuto & Michael O. Wirth, *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Overbuilds* (GSA Press 1998); *Government Entry* at 5-10; *Telecom Business* at 12-14. Most of these public systems have operated at significant losses, subsidized by local taxpayers, while failing to keep pace with new and cheaper technologies for providing the services. *See Government Entry* at 9-10. In a truly competitive environment, operating at a loss and failing to keep pace with technological advances would drive the inefficient competitor out of the marketplace. But in the case of the government provider, the natural market dynamics are distorted because of the cross-subsidies and other inherent advantages it enjoys.

Ultimately, taxpayers are forced to bear the risks of these ventures rather than private investors. The recent turmoil in the telecommunications industry underscores these potential risks. Over the past two years, there have been over eighty bankruptcy filings by private sector telecommunications companies and a market capitalization loss of over two trillion dollars. Yuki Noguchi, *Firm Offers One-Stop Telecom Shopping*, Wash. Post, May 13, 2003; Bob Fernandez, *Telecom Industry Devastated by the Boom that Never Was*, Phila. Inquirer, June 30, 2002.

C. State Control Over Local Government Entry Is Essential To Effective Competition.

Given the adverse risks to competition, consumers, and taxpayers created by government entry, many states have

enacted laws that restrict or prohibit their political subdivisions from providing local telecommunications services.[19] These laws enable a state to allocate its resources to more traditional means of promoting the deployment of advanced telecommunications services within its borders, such as removing regulatory barriers and providing other incentives for private entrants to invest in local communities. *Telecom Business* at 16-17 (citing examples). Mississippi, for example, recently enacted a law that provides income and franchise tax credits for investments in broadband equipment. S. 2979, 2003 Reg. Sess. (Miss. Apr. 19, 2003). Such tailored governmental actions provide incentives for private competitors to invest in new telecommunications technology and to deploy their networks in rural communities. And instead of competing against private enterprise, this type of approach stimulates effective competition while reducing the need for state regulation of the services.

States that have permitted market entry by their political subdivisions, on the other hand, have been compelled to enact level playing field laws and regulations designed to deter anti-competitive behavior and to protect consumers.[20] These laws are often similar in design and purpose to many provisions of the 1996 Act. Virginia, for example, has enacted level playing field requirements to regulate municipal entry

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[19] *See, e.g.*, Mo. Ann. Stat. § 392.410.7 (West Supp. 2003); Tex. Util. Code §§ 54.001, 54.201-.202 (Vernon 2002); Ala. Code §§ 11-50B-1 *et seq.* (Supp. 2002); Ark. Code Ann. § 23-17-409 (Michie Supp. 2002); Neb. Rev. Stat. Ann. §§ 86-128(1)(b), 86-575(2) (Michie Supp. 2002); Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001); Tenn. Code Ann. § 7-52-601 *et seq.* (Supp. 2001).

[20] *See, e.g.*, Fla. Stat. Ann. §§ 125.421, 166.047, 196.012(6), 199.183(1)(b), 212.08(6) (2000 & Supp. 2003); Iowa Code Ann. § 388.10 (West 2002); Minn. Stat. Ann. § 237.19 (West 2002); S.C. Code Ann. § 58-9-2620 (2002); Utah Code Ann. §§ 10-8-14, 10-18-101-106, 10-18-201-204, 10-18-301-306 (2003); Va. Code Ann. §§ 15.2-1500, 56-265.4:4 (Michie Supp. 2002).

into local telecommunications markets. *See* Va. Code Ann. §§ 15.2-2160, 56-265.4:4 (Michie Supp. 2002). The Virginia State Corporation Commission recently issued administrative rules to implement the Commonwealth's level playing field mandates. The new rules require, among other things, that municipal entrants submit data, on an annual basis, demonstrating that they are not offering telecommunications services below the incremental cost of providing them, and maintain separate books and records for their telecommunications businesses. *See* Order Adopting Rules, Case No. PUC-2002-00115, 20 VAC 5-417-40 (Va. State Corp. Comm'n Apr. 9, 2003). These requirements are similar to some of the restrictions imposed on BOC entry into long distance markets under Section 271 of the 1996 Act, as previously shown.

Development of such level playing field laws requires extensive efforts by state and local legislative and regulatory officials, as well as private industry. Administration and enforcement of the laws has also proven to be difficult. In the case of Virginia, for instance, Sprint has been participating in costly, months-long regulatory proceedings in which BVUB must demonstrate that it has complied with the Commonwealth's level playing field requirements. The proceedings involve a review of complicated cost studies and other information by the Virginia State Corporation Commission and interested private parties, to ensure that BVUB is not subsidizing its telecommunications services with public funds or revenues and is complying with other requirements that protect against anti-competitive conduct. *See* Order, Case No. PUC-2002-00231 (Va. State Corp. Comm'n Dec. 19, 2002).

Even with comprehensive level playing field laws and regular state administrative oversight, it is virtually impossible to account for all of the potential hidden subsidies and advantages that a municipality or other public entity may enjoy in "competing" for local telecommunications services.

See Telecom Business at 15 (because most of these subsidies and other advantages are "hidden from view and difficult or impossible to quantify, the one thing public utilities never do is provide an accurate gauge of the true costs of providing any service"). It is thus highly unlikely that state regulatory attempts to replicate a level playing field will ever result in efficient competition. The only certainty is that government entry requires *increased* state regulation of local telecommunications services, rather than reduced state regulation as envisioned by Congress.

The ability of States to prohibit market entry by their political subdivisions, therefore, is critically important to the viability and growth of competition for local telecommunications services. As shown, in many cases, states have concluded that market entry by municipalities would distort the marketplace, impede effective competition, and harm consumers. In other cases, states may conclude that the costs of enacting and enforcing level playing field laws are too high, and the continuing risks of cross-subsidization and discriminatory practices despite such laws are too great, to justify municipal entry. In all cases, however, such regulatory decisions are consistent with the central role that Congress intended for the States to play under the 1996 Act in helping to ensure a level playing field for competition in their local markets.

IV. SECTION 253(a) SHOULD BE CONSTRUED TO PRESERVE STATE AUTHORITY OVER MUNICIPAL ENTRY INTO LOCAL TELECOMMUNICATIONS MARKETS.

The Eighth Circuit has construed Section 253(a) of the 1996 Act, 47 U.S.C. § 253(a), to preempt state laws that prohibit municipalities and other political subdivisions from providing intrastate telecommunications services. (FCC Pet. App. at 6a, 7a). The court found that the words "any entity" in the statute encompass municipalities and evince an

unambiguous intent by Congress to preempt state authority in this area, thus satisfying the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Accordingly, the court struck a Missouri statute that precluded market entry by municipalities.

The Eighth Circuit's decision strains the statutory language and cannot be squared with the powers that Congress gave to the States under the 1996 Act. As shown, Congress expected the States to play a primary role in ensuring that local markets were opened to competition, that discriminatory and other anti-competitive practices were eliminated, and that rates for services were market-based and free of any cross-subsidization. There is no basis to presume that Congress intended to give such authority to the States over private entrants, while at the same time preempting the States' authority to control market entry by their own municipalities to protect against the same risks and harms. Such a result would not only undermine the pro-competitive purposes of the Act, but, as Petitioners have fully addressed, would significantly intrude on the traditional sovereign authority of the States over their political subdivisions.

Yet, that is precisely the effect of the Eighth Circuit's construction of Section 253(a). The Eighth Circuit's decision mandates that the States allow the entry of individual municipalities and other state instrumentalities into local telecommunications markets. The States are powerless to prohibit municipal competition with private enterprise, even when they have concluded that such entry will distort the marketplace, deter new entrants, and ultimately harm consumers. The decision similarly prevents the States from prohibiting municipal entry based on any statewide policies or goals for promoting fair and effective competition or the deployment of advanced telecommunications and information technologies or services.

By mandating municipal entry, the Eighth Circuit's decision also effectively conscripts the States into developing and enforcing level playing field laws, in an attempt to prevent cross-subsidization and other discriminatory practices by municipal entrants. Thus, unlike the 1996 Act, which invited, but did not compel, the States to assume regulatory authority over private entrants, the Eighth Circuit's construction of Section 253(a) virtually requires the States to engage in costly, time-consuming regulatory proceedings, even if a state believes such efforts will not adequately eliminate the public subsidies and other inherent advantages enjoyed by municipal entrants. At the same time, the Eighth Circuit's decision opens the door for municipalities and other local subdivisions to resist, under the guise of "federal preemption," legitimate efforts by the States to impose such level playing field conditions on market entry to prevent anti-competitive conduct. Local government entrants can be expected to argue that such state legislative curbs are "barriers to entry" that have the effect of prohibiting their ability to compete with private companies, thus running afoul of Section 253(a)'s mandates. These disputes will undoubtedly generate additional litigation and will increase the costs and burdens to states and private competitors.

The D.C. Circuit and the FCC, in contrast, have correctly held that Section 253(a) does not preempt the authority of the States to prohibit their political subdivisions from providing telecommunications services. Both the court and the agency found that the words "any entity" in Section 253(a) are properly read only to prohibit state or local statutes or regulations that impose restrictions on market entry by private entities, and do not evince a plain and unmistakable intent by Congress to intrude on the sovereign power of a state to control market entry by its own political units. Accordingly, the D.C. Circuit affirmed the FCC's determination that Section 253(a) did not preempt a Texas statute which generally prohibits municipalities from providing telecommu-

nications services. *City of Abilene, Tex. v. FCC*, 164 F.3d 49, 52-54 (D.C. Cir. 1999).

These decisions are better reasoned and adhere more faithfully to the "plain statement" rule of *Gregory*. The term "entity" can mean different things depending upon the context. *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding use of term "entity" ambiguous in 47 U.S.C. § 224); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding use of term "entity" ambiguous in 47 U.S.C. § 275(a)(2)). And this Court recently found that use of a modifier like "any" in a statute is insufficient evidence of congressional intent to interfere with the sovereign relationship between a state and its political subdivisions. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-46 (2002) (interpreting terms "any claim" in determining whether tolling provisions of 28 U.S.C. § 1367(d) applied to state claim dismissed on Eleventh Amendment grounds). In contrast to the ambiguous language used in Section 253(a), Congress has spoken with "unmistakable clarity" in other statutes when it intended to intrude on a state's traditional sovereign authority. For example, in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), this Court held that Congress made its intent to abrogate state immunity in federal court "unmistakably clear" in the language of the Family and Medical Leave Act's family-leave provision, by enabling employees to seek damages "'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'" *Id.* at 1976 (citation omitted). Congress defined "public agency," in turn, to include both "'the government of a State or political subdivision thereof' and 'any agency of . . . a State, or a political subdivision of a State.'" *Id.* at 1977 (citation omitted). *See also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (holding that identical language in Age Discrimination in Employment Act of 1967 similarly satisfied the "clear statement rule").

The statutory structure of the 1996 Act also evinces an intent by Congress to preserve and expand the authority of the States in order to help implement local competition. *See Raygor*, 534 U.S. at 545-46 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted). As shown, the 1996 Act contains numerous provisions that enlist the aid of the States in establishing the terms and conditions under which private entrants compete for local telecommunications services, preventing discriminatory or other anti-competitive practices, and eliminating any cross-subsidization of rates. The central role given to the States under the 1996 Act in these vital areas supports the conclusion that Congress did not intend to preclude them from exercising authority over their own instrumentalities to protect against the same harms and to help ensure a level playing field for competition in their local markets.

Moreover, as discussed above, the 1996 Act expressly preserved the States' traditional authority over significant intrastate activities. This authority includes the establishment of additional regulations governing access and interconnection obligations, 47 U.S.C. § 251(d)(3), service quality standards and requirements, *id.* § 252(e)(3), and other important state policies, *id.* § 253(b)-(c). The careful preservation of state authority under these provisions, including other subparts of Section 253, further suggests that Congress did not intend to preempt the States' ability to control the activities of their own instrumentalities under Section 253(a). *See Sailors v. Board of Educ. of Kent County*, 387 U.S. 105, 107-08 (1967) (discussing the States' long-standing, "abso-

lute discretion" in determining the powers conferred on their political subdivisions).[21]

Even apart from the inherent ambiguity of the terms "any entity," therefore, the statutory structure and purposes of the 1996 Act fully support the view that Congress did not intend by Section 253(a) to interfere with the States' sovereign authority over their political subdivisions. Against the full statutory backdrop, the mere use of the words "any entity" in Section 253(a) does not evince the type of unmistakable intent by Congress to intrude on the internal structure of state governments that *Gregory* requires. 501 U.S. at 464 (a court must be "absolutely certain that Congress intended" to intrude on the power of the States). And, given the potential harms created by municipal entry into local telecommunications markets, it is indisputable that construing Section 253(a) to preserve state authority in this important area will promote, rather than undermine, the pro-competitive goals of the 1996 Act.

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that this Court hold that Section 253(a) does not preempt the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

[21] This conclusion is further strengthened by Section 601(c) of the 1996 Act, in which Congress more generally provided that the "Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152(c)(1).

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Petitioner,

-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
Petitioners,

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES TELECOM ASSOCIATION, VERIZON, BELLSOUTH, AND CENTURYTEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The United States Telecom Association ("USTA") is a not-for-profit trade association for the local telephone industry, which represents some 600 facilities-based incumbent wireline providers of local telephone service; twenty-three of its members provide local telephone service in Missouri.[1] The Verizon telephone companies ("Verizon")[2] together are the largest providers of wireline communications in the United States and offer local, long distance, data, and broadband (or high-speed data) services to customers in 49 states and the District of Columbia. BellSouth Corporation ("BellSouth") provides wireline communications, including local, long distance, broadband, and data services, to

1. Pursuant to Rule 37.3(a) of this Court, consents of counsel for the Petitioners and for the Respondents have been obtained and filed with the clerk of the Court. Pursuant to Rule 37.6, no counsel for either party has authored this brief, in whole or in part, and no person or entity, other than the amici curiae, their members, or counsel, have made monetary contributions to the preparation or submission of this brief.

2. The following Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company: Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Midwest Incorporated d/b/a Verizon Midwest; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

customers in nine southeastern states.[3] CenturyTel, Inc. ("CenturyTel") provides wireline communications, including local, long distance, broadband, and data services, primarily to rural customers, in twenty-two states across the country, including Missouri.

Amici have a vital interest in the proper construction of Section 253(a), 47 U.S.C. § 253 (a), which was enacted as part of the reforms established by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Throughout the country, a growing number of local governments are providing or seeking to provide telecommunications services. Unlike other competitors, these local governments can take advantage of their "regulator" status both to advantage themselves and to disadvantage competing private providers. Local governments control access to local public rights-of-way, and have misused that authority to attempt to require telephone companies to pay exorbitant rights-of-way fees or to install and "donate" facilities for local governments' own use. Local governments have even used their governmental status to secure discriminatory tax breaks and public funding for their ventures that are unavailable to non-governmental competitors and to exempt themselves from the regulatory requirements they impose on those competitors. This type of leverage uniquely and directly threatens Congress' goal, as expressed in Section 253, 47 U.S.C. § 253, of creating a level playing field for all telecommunications providers.

Finally, as recent events in the marketplace amply demonstrate, the telecommunications industry is a risky,

3. BellSouth's wholly owned domestic subsidiaries that provide wireline services include BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.

capital-intensive business. Local governments' entry into the telecommunications market thus threatens the public fisc, which in turn may result in increased tax burdens on businesses and residents of the State, creates substantial market uncertainties, suppresses competing private investment, and can lead to serious municipal budgetary problems. For all these reasons, *amici* support the right of state governments to limit or prohibit their own political subdivisions from undertaking risky capital investments in competition with private entities.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit should be reversed. The Eighth Circuit held that the 1996 Act preempted the Missouri statute solely because Congress used the word "any" to modify "entity" in Section 253(a). In doing so, the Eighth Circuit construed Section 253(a) to impair the power of States to shape and control the activities of their political subdivisions, an essential attribute of state sovereignty. That interpretation works an extraordinary federal intrusion into the traditional authority of States to decide what powers they choose to grant (or withhold from) their own political subdivisions.

The Eighth Circuit read Section 253(a) to shield local governments from state laws that prohibit them from providing telecommunications services. That reading badly misinterprets the statute. The text, structure, context, and purpose of Section 253 all point in one direction: Section 253(a) was meant to *constrain* state and local regulatory authority over telecommunications providers, not to *insulate* local governments from state laws that define or restrict the very authority delegated to them by the States.

Simply put, the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991) – which requires that Congress be "unmistakably clear" when it purports to alter the constitutional balance between the Federal Government and the States – is not satisfied in this case. Congress did not define the term "entity" in the 1996 Act to include local governments, even though it has done so explicitly in other federal statutes. Neither the adjective "any" nor the noun "entity" constitutes the clear and unambiguous statement by Congress necessary to demonstrate that it wished to test the limits of its power and encroach drastically upon an essential element of state sovereignty – namely, the authority of a State to control the activities of its political subdivisions. Furthermore, construing the term "entity" to include "local government," as the Eighth Circuit did, would turn Section 253(a) into a circular and absurd provision by providing both state and local governments the power to seek preemption of their *own* laws. Under any reasonable reading of the statute, and certainly under *Gregory*'s stringent test, Congress clearly did not intend the term "entity" to include local governments.

Finally, the Eighth Circuit's decision also ignores the compelling reasons behind state laws that, like the Missouri statute, restrict or prohibit the right of local government to provide telecommunications services. States have legitimate, long-standing reasons to control the authority of their political subdivisions, including limiting their ability to engage in risky and capital-intensive commercial enterprises. Courts should not lightly assume that Congress handicapped the ability of state governments to make these critical policy decisions regarding the management of their political subdivisions. For all of these reasons, the Eighth Circuit's decision should be reversed.

I. PROPER APPLICATION OF THE "PLAIN-STATEMENT" RULE OF *GREGORY v. ASHCROFT* MANDATES REVERSAL OF THE DECISION BELOW.

The Eighth Circuit held that Section 253(a) evinces an intent by Congress to override a state's traditional authority to control its own political subdivisions. That holding gravely misconstrues the statute itself and misapplies the plain-statement rule.

A. The Constitution creates a system of dual sovereignty between the Federal Government and the States. States "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory*, 501 U.S. at 457 (*citing Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). In this system, the Federal Government has limited, enumerated powers, and the States retain all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. Among the most essential of these retained powers are those of self-organization or, stated otherwise, the manner in which a "State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

These powers include the right to prescribe the qualifications of a State's own officers, the ability to control its political processes, and the authority implicated here – the power to regulate the activities of its own political subdivisions. As this Court long has recognized, a State's power to organize itself into subdivisions and to delegate (or not to delegate) its powers to those subdivisions is a core structural authority that affects the State's exercise of all substantive powers. *See City of Columbus v. Ours Garage &*

Wrecker Serv., Inc., 536 U.S. 424, 437 (2002) ("Whether and how to [subdivide and delegate substantive power] is a question central to state self-government."); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) ("States have [wide latitude] in creating various types of political subdivisions and conferring authority upon them."); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [political subdivisions] . . . rests in the absolute discretion of the State.").

Congress may, of course, legislate in areas traditionally governed by the States if those areas are otherwise within the scope of its enumerated powers. In enacting the 1996 Act, Congress did just that. For most of the twentieth century, local telephone service was treated as a natural monopoly and was provided under a system of exclusive local franchises granted by the States. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act created a new "national policy framework" for regulation of local competition that supplanted the state-run franchise system. *Id.*

Out of respect for our national system of dual sovereignty, this Court repeatedly has required that Congress be "unmistakably clear" when it purports to alter the constitutional balance between the Federal Government and the States. *Gregory*, 501 U.S. at 460. Thus, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the States absent a clear expression of congressional intent to do so. This rule not only protects the proper balance of power between the Federal Government and the States, but also implements "the doctrine that statutes should be construed so as to avoid difficult

constitutional questions." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). As applied in the context of state authority to create and define the powers of political subdivisions, the rule instructs that "federal courts should resist attribution to Congress of a design to disturb a state's decision on the division of authority between the state's central and local units." *City of Columbus*, 536 U.S. at 440.

B. The text, structure, context, and particular purpose behind Section 253 do not reveal that Congress ever intended – let alone clearly – for the term "entity" to include a political subdivision of a State. The language of Section 253(a) does not approach the unmistakable clarity required by *Gregory*. Section 253(a) provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of ***any entity*** to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a) (emphasis added).

This language does not *obviously* identify a political subdivision of a State as an "entity." That is, nothing in the phrase "any entity" affirmatively sweeps political subdivisions within its scope. To be sure, the adjective "any" is broadly inclusive, but its scope cannot be understood without a clear understanding of the noun that "any" modifies.

Although it could have done so, Congress did not define the term "entity" as used in Section 253(a). The ordinary meaning of the word thus applies. *See Morales v. Trans World*

Airlines, Inc., 504 U.S. 374, 383 (1992). In ordinary language, the word "entity" might theoretically include a governmental unit but most naturally connotes a commercial organization, such as "a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, [or] an association." *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (*quoting Alarm Indus. Communications Comm. v. FCC*, 131 F. 3d 1066, 1070 (D.C. Cir. 1997)). At most, the term "entity" is ambiguous as to the particular boundaries of its scope. The D.C. Circuit reached this very conclusion, in analyzing the term as contained in other parts of the 1996 Act. *See S. Co. Servs. Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) ("entity" in 47 U.S.C. § 224 "bears different meanings depending upon the context" and "[t]he most that can be said is that § 224(e)(2) is unclear on whether utilities or municipalities count as 'attaching entities'"); *Alarm Indus. Communications Comm.*, 131 F.3d at 1068 ("entity" in 47 U.S.C. § 275(a)(2) is ambiguous). Given the absence of any explicit direction from Congress regarding the precise meaning of "entity," there is simply no support for the proposition that Congress intended that term to encompass local governments.

Moreover, a review of other federal statutes makes clear that when Congress means to sweep governmental actors within the scope of the term "entity," it knows precisely how to do so. In the Bankruptcy Code, Congress expressly defined "entity" as "includ[ing a] person, estate, trust, *governmental unit*, and United States trustee." 11 U.S.C. § 101(15) (emphasis added); *see In re Carter*, 131 B.R. 4 (D. Conn. 1991) (state court is a governmental unit and thus an "entity" subject to the automatic stay provisions of the Bankruptcy Code). The fact that Congress

has *not* done this in Section 253 strikes a direct blow to the contention that "entity," as used there, includes local governments. As this Court repeatedly has held, the juxtaposition of a statute that contains specific language with one that does not creates a strong inference that courts should not read that language into the latter statute; if Congress had wanted to incorporate the relevant terms, it would have said so. *See, e.g., Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (analysis of related statute demonstrates that Congress "knew exactly how" to provide an innocent owner defense and reinforces the conclusion that no such defense exists in another statute that does not contain similarly express language).[4]

The context, purpose, and structure of Section 253 as a whole further undermine the proposition that local governments are included within the scope of the term "entity." *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (meaning of statutory term that is ambiguous standing alone must be ascertained by reference to the specific statutory context in which it is used). The fundamental aim

4. Respondents' effort to rely on a single statement by Senator Lott during hearings on the predecessor legislation to the 1996 Act that "the rural electric associations, *the municipalities*, and the investor-owned utilities[] are all positioned to make a real contribution" in the development of a competitive telecommunications market, is entirely misplaced. *See Hearings on S.1822, The Communications Act of 1994, Before the Senate Comm'n on Commerce, Science, and Transp.*, 103rd Cong., 2d Sess. 466 (1994) (statement of Sen. Trent Lott) (emphasis added). Senator Lott's statement was not made during a discussion of Section 253 but of an entirely different provision, the precursor to Section 103, which amended the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79(a) to 79(z), to authorize registered holding companies to invest in telecommunications under certain circumstances.

of Section 253 was to prevent state and local regulators from throwing anti-competitive roadblocks in the way of telecommunications companies otherwise subject to governmental authority. This distinction between state and local governments, on the one hand, and private telecommunications providers, on the other, reflects the central purpose of Section 253.

Congress adopted Section 253 as part of "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition," S. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (emphasis added). Section 253 in particular was intended to "end[] the States' longstanding practice of granting and maintaining local exchange monopolies," *Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., dissenting), and to protect telecommunications providers from a burdensome "third tier" of local regulation, *TCI Cablevision*, 12 F.C.C.R. 21396, 21441 (1997). Congress thus imposed "sweeping restrictions on the authority of . . . local governments to limit the ability of telecommunications companies to do business in local markets." *Bell Atlantic-Md., Inc. v. Prince George's County, Md.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). And telecommunications companies, in turn, were given the right to seek federal preemption of any improper restrictions imposed on them by those governments. 47 U.S.C. § 253(d). To move local governments from the class of organizations whose actions are *subject* to preemption into the class of "entities" *entitled* to preemption would turn the purpose of Section 253(a) inside out.

Throughout Section 253, Congress clearly distinguished between state and local governments as regulators, on the one hand, and private telecommunications providers on the other. The opening phrase of Section 253(a) proscribes any "State *or local statute or regulation*, or other State *or local legal requirement*" that hinders the ability of telecommunications providers to offer services, making clear that the actions of local governments are among those that the statute seeks to restrain, not to protect. 47 U.S.C. § 253(a) (emphases added). Similarly, Section 253(c) preserves the preexisting "authority of a State *or local government*" to manage rights-of-way or to require compensation "from telecommunications providers," *id.* § 253(c) (emphasis added), reinforcing the distinction between local governments as regulators and the telecommunications providers that are the entities subject to the exercise of that local regulatory authority. Finally, Section 253(d) provides that the Federal Communications Commission ("FCC") must preempt state or local law if it "determines that a State *or local government* has permitted or imposed any statute, regulation, or legal requirement that violates" Section 253. *Id.* § 253(d) (emphasis added). Section 253(d) drives home the point that local governments are among those whose regulatory actions are constrained by Section 253, not those – such as private telecommunications providers – that are within the zone of interests that Section 253 protects and thus entitled to invoke its preemptive force.[5]

---

5. The fact that the statute uses the specific phrases "local government" and "local regulation" in subsections (a), (c) and (d) makes it even more implausible that the general term "entity" was meant to include local governments, and again, shows that when Congress means to cover local governments, it knows how to do so. *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, (Cont'd)

Indeed, reading the term "entity" in Section 253(a) to include local governments produces absurdly circular results. Accepting that local governments are "entities" under Section 253(a) would mean that a local government's telecommunications operation is entitled to preemption of the local government's own "local statute[s] or regulation[s]" – potentially nullifying a local government's ability to control its own operations – because Section 253(a) prohibits both state and local regulations that limit the ability of "any entity" to provide telecommunications services. It should go without saying that Congress could not have intended to protect local governments from *themselves* by awarding them a federal right to preempt their own enactments. Indeed, if the term "entity" can be stretched to include governmental units, there is no principled stopping point to its expansion: States themselves could be covered "entities" under Section 253(a). This would mean that Section 253(a) also preempts State laws restraining the State itself or State agencies from entering into the telecommunications business. These nonsensical results argue forcefully against any such reading.

In short, in light of the statutory text, context, purpose, and structure, as well as the absurd results produced by the reading adopted by the Court of Appeals, it is simply impossible to hold that Section 253 meets the stringent test of *Gregory*'s plain-statement rule.

The Eighth Circuit's contrary conclusion ignores this backdrop, and instead hinges solely on Congress' use of the

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(Cont'd)

205 (D.C. Cir. 1986) ("'[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.'") (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984)).

word "any" to modify "entity." But as the Court recently made clear, Congress' use of the modifier "any" in a statute does not, without more, satisfy *Gregory*'s plain-statement rule. In *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002), the Court examined the scope of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations for "any claim" that a federal court dismisses under its supplemental jurisdiction. The question presented was whether Section 1367(d) applies to claims that are filed against non-consenting States and ultimately dismissed on Eleventh Amendment grounds. If a federal statute could toll a state limitations period for such claims, that would have resulted in an "abrogation," 534 U.S. at 541, of State sovereign power. Thus, *Raygor* clearly implicated the plain-statement rule of *Gregory*.

The Court held that, although Section 1367(d) pertains on its face to "any" claim, it could not be read to apply to the particular ones at issue:

> With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any claim "asserted" under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'any recipient of federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a State defendant was a recipient of federal aid. Instead, we held that "when Congress chooses to subject the States to federal

> jurisdiction, it must do so specifically." Likewise, § 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States. . . .

Id. at 544-45 (citations omitted).

Raygor therefore reinforces that *Gregory* requires more than the existence of the word "any" in a federal statute before the statute can be read to overturn traditional federal-state relations: it requires an affirmative indication that Congress clearly intended to intrude into matters at the heart of State sovereignty. No such indication exists here. As the D.C. Circuit explained, the fact that it is "linguistically possible to include a municipality under the heading 'entity'" is not a sufficient basis to find preemption. *City of Abilene*, 164 F.3d at 52. Because "[i]f it were, *Gregory*'s rule of construction would never be needed." *Id.* at 53.[6]

As the foregoing shows, the Eighth Circuit's erroneous reading of Section 253(a) drives a wedge between the State

6. The Eighth Circuit ignored *Raygor* entirely and instead relied heavily on this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997). *See Mo. Mun. League v. FCC*, 299 F.3d 949, 954-55 (8th Cir. 2002). This reliance is misplaced. The federal bribery statute at issue in *Salinas* did not involve, as here, federal intrusion into the core power of the States to organize their own structures of governance. *See Salinas*, 522 U.S. at 60. Furthermore, the Court in *Salinas* was concerned that the reading of the bribery statute advanced by the petitioner, in reliance on *Gregory*, would "strain[] and distort[]" that statute. *Id.* at 59 (citation omitted). As discussed above, in this case, it is the Eighth Circuit's interpretation that "depart[s] from the statute's terms." *Id.* at 60. There is no conflict between the clearly superior reading of Section 253(a) and the plain-statement rule of *Gregory*, and *Salinas* is thus irrelevant.

and its own political subdivisions, creating rights in the political subdivision that may be asserted against the State and overriding the State's choice of what rights and duties to delegate to its subdivision. The Eighth Circuit's reading cannot be justified in light of the text, structure, context, and purpose of Section 253. This Court should correct the Eighth Circuit's misapplication of *Gregory* and the plain-statement rule, which will in turn ensure that States retain their sovereign power to make choices about their governmental structures and thereby ensure the responsible operations of their political subdivisions.

II. STATES HAVE COMPELLING REASONS TO PROHIBIT OR LIMIT THEIR POLITICAL SUBDIVISIONS FROM PROVIDING TELECOMMUNICATIONS SERVICES.

The Eighth Circuit's decision also ignores one certainty: States regularly restrict or control the authority of their political subdivisions. It is well within the purview of the States to do so, and those choices – and the public policies that undergird them – should not be second-guessed. Courts should not (and under *Gregory* cannot) lightly assume that Congress intended to override these judgments and mandate unilaterally that the provision of telecommunications by local governments is a public good.

In fact, this issue is becoming a growing concern for a number of States. In increasing numbers, local governments are competing or seeking to compete with private industry to offer traditional telephone, cable, Internet access, or broadband services. A study released in January 2001 estimated that 61 local governments offered Internet access services, 32 provided high-speed data services, and 18 offered

local dial tone services.[7] Those numbers have increased dramatically since that date. The American Public Power Association reported that at the end of 2002 over 500 government utilities offered some type of broadband telecommunications services, from fiber leasing, to Internet access, to local telephone service.[8] This trend is expected to continue as more and more local governments consider building telecommunications and broadband networks. *See, e.g.*, Dinesh Kumar, *Large Number of Municipal Utilities Eying the Broadband Market, Communications Daily*, Apr. 1, 2003, at 3.

In response to this trend, at least twelve States, including Missouri,[9] have passed laws that address the entry of their political subdivisions into the telecommunications market.[10]

7. Jeffrey A. Eisenach, *Does the Government Belong in the Telecom Business?* 8.1 Progress on Point, 18-23 (Jan. 2001), *at* http://pff.org/publications/ POP8.1GovtTelecom 011001 LOGO.pdf.

8. *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), *at* http://www.appanet.org/legislativeregulatory/ broadband/ CommunityBroadbandFact.pdf.

9. The Missouri statute provides, in relevant part: "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service . . ." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003). The statute was extended by the Missouri legislature in July of 2002 and now has an expiration date of August 28, 2007. *See Mo. Mun. League*, 299 F.3d at 952 n.3.

10. These states are Arkansas (Ark. Code Ann. § 23-17-409 (Michie 2002)), Florida (Fla. Stat. Ann. § 166.047 (1989 & Supp. (Cont'd)

These laws range from procedural protections that attempt to equalize the competitive status of local governments and private competitors to outright bans on local governments providing telecommunications.[11] As discussed below, there are ample justifications for these prohibitions.

A. Because local governments have at their disposal delegated police powers, those that compete directly with private companies can enjoy several unfair advantages. In most areas, local governments set the terms and conditions for their competitors' access to public rights-of-way.

(Cont'd)

2003)), Minnesota (Minn. Stat. Ann. § 237.19 (West 2003)), Nevada (Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001)), South Carolina (S.C. Code Ann. § 58-9-2600 (2002)), Tennessee (Tenn. Code Ann. §§ 7-52-601 to 611 (Supp. 2001)), Texas (Tex. Util. Code Ann. §§54.201 to 261 (Vernon 2002)), Utah (Utah Code Ann. §§ 10-18-101 to 306 (2003)), Virginia (Va. Code Ann. § 15.2-2160 (Michie Supp. 2002)), and Washington (Wash. Rev. Code § 54.16.330 (2003)). In addition, the statute at issue in the case before the Nebraska Supreme Court was intended to limit the provision of telecommunications services by municipalities. *In Re Lincoln Elec. Sys.*, 655 N.W. 2d 363, 371-72 (Neb.), *cert. denied*, *Neb. Pub. Serv. Comm'n v. Lincoln Elec. Sys.*, 123 S. Ct. 2620 (2003).

11. *See, e.g.*, Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003) (imposing taxes on prices of telecommunications services provided by public entities); Minn. Stat. Ann. § 237.19 (West 2003) (requiring municipalities to obtain 65% super-majority of voters before providing telecommunications services); Tenn. Code Ann. § 7-52-602 (Supp. 2001) (requiring municipalities to meet disclosure and voting requirements); Va. Code Ann. § 15.2-2160 (Michie Supp. 2002) (requiring localities with telecommunications operations to file annual reports with Virginia Commission and mandating that private providers have nondiscriminatory access to public rights-of-way, poles, conduits, and other publicly owned facilities).

The 1996 Act grants States and local governments the authority to manage the public rights-of-way and to require "fair and reasonable compensation" for their use.[12] Under this system, and as authorized by state law, local governments may require private companies to obtain their permission in order to access streets, sidewalks, utility poles, conduits, or public lands to install facilities. In exchange for this access, private companies may be required to pay compensation to local governments. Despite the dictate that local governments charge only "fair and reasonable compensation," some localities have charged excessive rights-of-way fees as a precondition to access the rights-of-way. Others have exacted fees that are wholly unrelated to the actual costs of managing the rights-of-way but that instead raise revenue, charging "rent" based on a percentage of the providers' gross revenue. *See, e.g., City of Auburn v. Qwest Corp*, 260 F.3d 1160, 1176 (9th Cir. 2001) (holding that rights-of-way fees based on a percentage of private companies' gross revenues violate Section 253(c)), *cert. denied, City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002). Private companies must absorb these charges or pass them along to customers through higher rates or charges. These unwarranted fees are particularly discriminatory as applied to wireline telephone companies because other

12. Specifically, the 1996 Act provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c).

competitors that provide the same services using different technologies (*e.g.*, wireless or Internet telephony providers) do not incur these rights-of-way charges.

Local governments have employed their regulatory authority over the public rights-of-way in order to discriminate against private competitors and leverage their advantage in other ways. Specifically, local governments have imposed onerous permit or application requirements that complicate or delay competitors' access to the public rights-of-way,[13] and have even exempted themselves from the very requirements they impose on private companies. For example, after beginning to compete with the local incumbent cable provider, a city in Florida apparently required the private cable company to pay five percent of its gross revenues as a franchise fee, a fee from which the city exempted itself. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 Nw. U. L. Rev. 1099, 1118 (2001). Furthermore, local governments have required private companies to provide free conduit or other facilities as a condition for access to public rights-of-way, thus misusing their regulatory authority to gain a zero basis

13. *See, e.g., Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1100 (N.D. Cal. 2001) (application required the submission of the identity and legal status of carrier, a map and description of existing and proposed encroachments, a description of the services, three-year business plan, technical qualifications, information to establish that applicant has all necessary governmental approvals, and any other information deemed necessary by city); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 587-88, 593 (N.D. Tex. 1998), *vacated and remanded as moot*, 243 F.3d 928 (5th Cir. 2001).

asset for their own use in competition with private companies.[14] Local provision of telecommunications services thus creates incentives directly contrary to Congress' command that localities administer rights-of-way "on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c).

Due to their general governmental powers, local governments enjoy additional unfair advantages over private companies. They can exercise eminent domain or condemn property in order to acquire plant, facilities or property of other providers for their own use. Local governments may issue tax-free, interest-free or reduced-interest loans to raise capital to pay for operating expenses. They may secure tax advantages that are unavailable to their nongovernmental competitors because local governments do not pay federal income taxes and, in the absence of state law to the contrary, are not subject to property or income taxes. Localities have the ability to use public funds and raise taxes to subsidize losses, maintain artificially low rates, or shift costs to customers of electric or other services where the locality faces no competition. Further, by virtue of their "insider" status, local governments have access to proprietary information

14. Numerous federal court decisions have struck down requirements that private companies build and dedicate telecommunications facilities to municipalities as a condition for placing private telecommunications infrastructure under the city streets. *See, e.g., City of Auburn*, 260 F.3d at 1179 (*citing City of Dallas*, 8 F. Supp. 2d at 593); *see also Qwest Corp. v. City of Santa Fe, N.M.*, 224 F. Supp. 2d 1305, 1309 (D.N.M. 2002) (holding that Section 253 preempts local requirement that private provider "dedicate all conduit laid upon the City's property to the City" and upon installation of new conduit "install double the amount of capacity needed for the applicant's own use").

about their competitors gained through the rights-of-way permitting process and bidding processes for other government projects. For the same reason, they may also receive preferential treatment in the awarding of government contracts.

These unfair advantages deter private sector investment – a central goal of the 1996 Act. Congress passed the 1996 Act to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added). The FCC has also recognized that "only facilities-based competition" can "fully unleash competing providers' abilities and incentives to innovate." *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12673, 12676 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Order on Remand, FCC 03-36, ¶ 70 (rel. Aug. 21, 2003) ("We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goal."). The 1996 Act thus envisioned competition among multiple private companies that offer services using their own equipment and facilities.

For this goal of facilities-based competition to be realized, private companies must have incentives to invest the enormous up-front capital that telecommunications equipment and facilities necessarily require. Private industry has little economic incentive to invest in upgrading networks or building out new facilities in areas in which local governments have an unmerited advantage over competitors

or where the return on those investments is undermined by artificially subsidized rates. For these many reasons, a State, such as Missouri, might rationally conclude that local provision of telecommunications services is not worth the candle, and instead focus its statewide telecommunications policy on the encouragement of private investment in new infrastructure.

B. In addition, state laws prohibiting local governmental telecommunications enterprises are also justified as a means of ensuring that public funds are not placed at risk through commercial investments. Telecommunications is a volatile, technologically complex, and capital-intensive industry. News accounts are filled with examples of municipal-owned networks that have lost money, diverted funds from other pressing priorities, and overburdened taxpayers. States clearly have an interest in protecting the coffers of their political subdivisions, since the States could be forced to bail out such failed ventures or rescue localities from insolvency. And this, in turn, could lead to increased tax burdens on businesses and residents to cover these losses.

For example, in the late 1990s the city of Eugene, Oregon planned an 800-mile digital telecommunications network. The city scrapped those plans several years later when it concluded that its original estimate of $6 million was too low and its network would eventually cost $240 million to complete. Janet Colwell, *Broadband's Broad Price Tag, Faced With Hard Numbers, Eugene is Scaling Back Plans for a Citywide Telecom Network*, Oregon Business, Apr. 1, 2001, at 39. In Tacoma, Washington, the city built a fiber optic high-speed network called "Click!". In 1997, the city's budget estimate for the project was $40 million. By the year 2000, the city's costs had more than doubled, to almost $90

million, and Tacoma Public Utilities was forced to assess a more than 50% surcharge on customer bills.[15] In Grant County, Washington, a government utility raised electricity rates to subsidize losses for its telecommunications operations. Although the utility had invested $60 million in a fiber-optic network that served 9,000 households, in early 2003, only 4,100 taxpayers had purchased Internet, telephone or television services from the municipal utility and officials projected a scant $2 million in revenues for 2003, revenues which were not expected to cover operations and maintenance. Bert Caldwell, *Utilities May Want To Move Slowly*, The Spokesman-Review, Apr. 10, 2003, at A-16.

In sum, states such as Missouri must be permitted to decide whether their political subdivisions can or should compete in the private marketplace, as Missouri has done here. Indeed, at the end of the day, a State may well be liable for its political subdivisions' investment "mistakes" in this rapidly evolving and competitive market and should be entitled to take responsible steps to prevent such fiscal crises. All courts that have considered the question agree that the power of a State to oversee and control the activities of its localities is an essential aspect of sovereign authority. *See supra*, at 5-6. Entirely absent from the Eighth Circuit's decision is the recognition that the Missouri legislature has both the responsibility and the right to weigh these concerns and determine that the telecommunications marketplace is best left to private providers.

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15. Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, 9.7 Progress on Point 5-6 (Feb. 2002), *at* http://www.pff.org/publications/pop9.7guppyclick.pdf.

CONCLUSION

For these reasons, *amici curiae* USTA, Verizon, BellSouth, and CenturyTel respectfully urge this Court to reverse the decision of the Eighth Circuit.

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Attorney General of Missouri,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

SOUTHWESTERN BELL TELEPHONE, L.P.,
fka Southwestern Bell Telephone Company,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE VIRGINIA LOCALITIES IN SUPPORT OF RESPONDENTS

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INTEREST OF THE VIRGINIA LOCALITIES AS AMICI CURIAE

The Virginia localities joining in this brief, as represented individually or by their association – the Towns of Abingdon, Front Royal, and Richlands, and the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the Virginia Municipal Electric Association No. 1[1] – are towns and cities in Virginia with local electric systems or local telecommunications networks, or both. As in Missouri, the localities in Virginia have experienced life under an explicit barrier-to-entry statute. Some Virginia cities and towns, notably Abingdon, had municipal projects before the legislature passed the barrier-to-entry law.

As in Missouri, the Virginia barrier-to-entry was rejected in court – in the case of *City of Bristol v. Earley*. Following the federal court decision in *Earley*, the Virginia General Assembly changed the law, to allow local governments in some circumstances to provide telecommunications services. These local governments are enjoying the benefits which Congress intended in passing the Telecommunications Act of 1996 – some have begun offering telecommunications services, some have experimented

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae – the Virginia Towns of Abingdon, Front Royal, and Richlands, the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the members of Virginia Municipal Electric Association No. 1 – made a monetary contribution to the preparation and submission of this brief. The Virginia Municipal Electric Association No. 1 is made up of the Towns of Blackstone, Culpeper, Elkton and Wakefield and the Cities of Franklin, Harrisonburg and Manassas.

with pilot projects, and all have benefited from an improved competitive position by the mere possibility that they will provide telecommunications services, which gives these cities and towns leverage in dealing with private service providers. To explain to the Court how the repeal of the barrier-to-entry statute in Virginia is allowing local governments to act in ways that further the purposes of the 1996 Telecommunications, the Virginia localities submit this amicus brief.

SUMMARY OF ARGUMENT

The intent of Congress in passing the 1996 Telecommunications Act was to hasten the time when consumers and businesses all over the country realized the benefits of advanced services and competition in telecommunications. In rural areas, like many parts of Virginia, and sometimes even in the suburbs, shareholder-owned service providers have not found it in their interests to bring advanced services or to compete with established providers. To meet the goals of the Telecommunications Act, the "entities" that will provide services must include local governments. The experience of local government in Virginia, where a barrier-to-entry statute was lifted after the federal court determined it was preempted, shows how allowing local governments the opportunity to provide telecommunications serves the purposes of the Telecommunications Act.

1. Allowing local governments to provide telecommunications serves the purposes of the 1996 Act without unfairness to private industry or the public.

The Telecommunications Act of 1996 is a comprehensive rewriting of the Communications Act of 1934 that "fundamentally changes telecommunications regulation." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶ 1 (1996). The broad purposes of the 1996 Act are "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (purpose statement). "Congress intended that competition under the Telecommunications Act take root 'as quickly as possible.'" *GTE South, Inc. v. Morrison*, 199 F.3d 733, 744 (4th Cir. 1999).

The monopolies that were the specific target of the 1996 Act were those of the incumbent local exchange carriers, such as Verizon, Sprint, and Southwestern Bell. These companies have every incentive to fight the competitive vision of the 1996 Act in every way that they can, and their positions stated before this Court in this litigation are but one way in which they are doing just that. Even so, the 1996 Act does not leave the incumbents, their competitors, or consumers unprotected against the depredations of unfair competition.

Section 253 of the 1996 Act prohibits barriers to entry, but allows the states to continue to regulate telecommunications services in accordance with section 253(b), which provides: "Nothing in this section shall affect the ability of

a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The 1996 Act "was designed to prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices such as slamming." *Communications Telesystems Intern. v. California Public Utility Com'n*, 196 F.3d 1011, 1017 (9th Cir. 1999). In crafting section 253, Congress "recognized the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety, which are separate from any intent to create or maintain barriers to entry. Thus, it carved out safe harbors for these types of regulations." *Cablevision of Boston, Inc. v. Public Improvement Com'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999). Section 253(b) "preserves the ability of a state to regulate telecommunications on the basis of the 'public good.'" *TCG New York, Inc. v. City of White Plains, N.Y.*, 125 F. Supp.2d 81, 87 (S.D.N.Y. 2000); *see generally In re TCI Cablevision*, 12 F.C.C.R. 21,396, ¶ 107 (1997) ("Congress sought to strike a balance in the 1996 Act . . . [and] recognized the need for State and local governments to continue [*sic*] respond to truly local issues").

The "level-playing field" requirements of the 1996 Telecommunications Act were not intended to protect the monopolies of the incumbents. Incumbent carriers are protected, first and foremost, by their market share and resources as former monopolists. Incumbent carriers need

no protection from local government competition, yet they make use of state law level-playing requirements as an opportunity to thwart competition through litigation. When Sprint, for example, complains about how it has labored through the process for the City of Bristol to get its tariff to provide telephone service under the new rules of the State Corporation Commission, *see* Sprint Brief at 23-24, much of the difficulty and complication has resulted primarily from Sprint's own repeated requests for information and for injunctive relief. Sprint sought an administrative injunction against the City of Bristol before Bristol began its first day of providing service, and has been litigating with Bristol for information ever since. *See* Virginia State Corporation Commission Docket No. PUC-2002-00231 (petition filed by Sprint for a "Declaratory Judgment Interpreting Various Sections of Code of VA, for Injunction Prohibiting the City of Bristol from Providing Telecommunications Services in Violation of State Law and for Other Relief").[2]

Missing from the briefs of the appellants and their amici is any attempt to explain why local governments would ever want to get into the business of providing telecommunications services. It is expensive, the technology keeps changing, and the telephone companies and cable companies have the political and financial means and incentive to attack any form of competition. The answer, unfortunately, is that local governments step in to provide services and competition primarily when private industry does not. As with the other utility services provided by some of the Virginia localities – electricity, water,

[2] The docket entries are retrievable from the website of the Virginia State Corporation Commission, http://www.state.va.us/scc.

and sewer – telecommunications has become too important for unserved or underserved consumers to wait for the privilege of buying from a private service provider. Without the threat of competition from local governments, incumbent carriers in rural areas have no incentive to bring the best prices and the best technology to serve the rural customers.

For this very reason, the Commissioners of the Federal Communications Commission have specifically found in the Missouri case and earlier, that the provision of telecommunications services by local government furthers the purposes of the 1996 Act. *See In re Missouri Municipal League*, 16 F.C.C.R. 1157, ¶ 10 (2001), *vacated on other grounds*, 299 F.3d 949 (8th Cir. 2002) ("The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities . . . municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities"); *id.*, 2001 WL 28068 at *1172 (separate statement of Chairman Kennard and Commissioner Tristani ("The right policy for consumers is to have as many providers of telecommunications from which to choose-barring entry by municipally-owned utilities does not give consumers that choice"); *id.*, 2001 WL 28068 at *1173 (separate statement of Commissioner Ness) ("municipal utilities

can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas"); *see also In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3,460, ¶ 190 (1997), *petition for review denied*, 164 F.3d 49 (D.C. Cir. 1999) ("we encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications. . . . Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services"). Thus, the issue, correctly understood, in evaluating the Eighth Circuit's decision, is whether local governments should be considered "entities" as to which the federal law prohibits barriers to entry, when they are often the only "entities" that are willing and able to provide the services and competition that are the fundamental purposes of the Act.

2. In Virginia, some localities would be unserved or underserved unless local governments are considered "entities" that can provide telecommunications services.

Facts about Virginia prove that the provision of telecommunications services by local government furthers the purposes of the 1996 Act. The telecommunications industry went boom and bust in Virginia without bringing advanced telecommunications to many parts of the state. Following on the U.S. District Court's decision in *City of Bristol v. Earley*, and the resulting changes in Virginia law, some Virginia localities are acting to bring new services to their communities. Even for those localities that decide not to spend public money on becoming more "wired," the threat of competition and the possibility that the government may some day provide services spurs the private sector to move forward in ways it might not otherwise have done.

Notwithstanding the changes in the federal telecommunications laws in the 1990s, in most Virginia towns and small cities there has been only the one local exchange provider for telephone service and one cable television provider. Even though Virginia has many thousands of miles of fiber-optic voice and data lines, there are many gaps in the availability of advanced services, even in some suburban areas like Manassas outside of Washington, D.C. Away from the cities, shareholder-owned companies have avoided expansion of their services because rural and less-densely populated areas are thought to be less profitable. Moreover, their monopolies in small communities allow these companies to maximize fees and minimize costs, where there is no competition, in order to subsidize their efforts to compete in other areas where they have no monopoly. The result has been to deny access to affordable advanced telecommunications services to areas of Virginia at the very time when changes in the economy have deprived those areas of the mainstays of the economy over the last 50+ years. In Virginia, coal, tobacco, textiles, furniture, peanuts, and the fishing industries are all on the wane, leaving localities in every corner of the state wondering how to stay viable for the future.

In its final report to the General Assembly, the Rural Virginia Prosperity Commission explained that "[b]ecause private investors can usually obtain higher rates of return from telecommunications infrastructure investments in larger urban centers, it is not evident when, or if, market

forces will cause private investors to meet the telecommunications infrastructure needs of rural Virginia. . . . "[3] In particular, the form of telecommunications services that new business need is high-bandwidth connections to the Internet, to allow transmissions of high volumes of data. The Commission was told that "[n]ot only is high-speed access needed for businesses and industrial prospects, it is also needed by residents wanting to keep pace with the world."[4] As one Commission member has declared, "Broadband is an integral part of economic development and if rural areas are going to keep up with their urban and suburban neighbors they must have access to broadband. It is critical for business opportunities, education systems and local governments."[5] Facing the reality that private telecommunications companies would not provide the services they required, some local governments in Virginia began considering whether they should provide services for themselves, as they have done for the needs of their residents in providing water, sewer, power, and other utility services.

The idea of local government networks as a solution for economic development was first studied at length at

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[3] House Doc. No. 28, Rural Virginia Prosperity Commission, *From the Grassroots: Final Report of the Rural Virginia Prosperity Commission*, at p. 25 (Dec. 1, 2001), http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD282002/$file/hd28_2002.pdf.

[4] Amy Gatley, *Officials: Southwest Virginia's future prosperity dependent upon technology, education and tourism*, Kingsport Times-News, Dec. 6, 2000.

[5] Del. Steven Landes, quoted in *Private and Public Sector Efforts Bolster Broadband Activities Across the Commonwealth*, *at* http://www.vectec.org/media/news/broadband.html (last visited Oct. 17, 2003).

Virginia Tech, which worked with the Town of Blacksburg on what became the Blacksburg Electronic Village, or "BEV."[6] The Town of Abingdon, among others, picked up the idea of an "electronic" village, and installed a segment of fiber-optic cable down through the middle of town, allowing adjacent businesses and offices to hook up for cheap, high broadband connections to the Internet.[7] Lynchburg, Bedford, and Martinsville also pursued network projects of various kinds. The response of the telecommunications companies to what it saw happening with Lynchburg and Abingdon and elsewhere in Virginia was to convince the legislature to pass a new law explicitly barring local governments (other than Abingdon) from providing telecommunications services.

Regarding the City of Lynchburg's project, one researcher has explained:

> Upon learning of the success of the Lynchburg network build-out, the local telecom provider lobbied the state legislature to prevent local governments from operating telecommunications services and leasing of network capacities to any commercial organization or the public. As a result of these lobbying activities, several bills were considered in the 1998 legislative sessions in the Virginia legislature. Lynchburg, in coalition with other smaller cities, led an aggressively fought, but eventually lost, battle in the legislature against the large telcos and the cable industry that aimed to secure municipalities' right to offer telecommunications services.[8]

[6] *See generally Blacksburg Electronic Village*, *at* http://www.bev.net.

[7] *See generally Electronic Village of Abingdon*, *at* http://www.eva.org.

When this barrier-to-entry law was passed, rural Virginia expressed their concerns that "they won't get high-speed communications services unless they provide for themselves."[9] Their local governments argued before the legislature that "they need the ability to build fiber-optic lines and offer high-speed Internet services to promote economic development in the absence of the telephone industry being able to do it."[10]

The new law was 1998 Va. Acts of Assembly, Chap. 906, which added new language to Va. Code § 15.2-1500 prohibiting local governments from selling telecommunications services. Originally, the prohibition was to expire in the year 2000. In 1999, the Virginia telecommunications industry persuaded the legislature to remove the expiration date, in return for an industry-crafted "exception" to the general prohibition, that would allow localities to lease only "dark fiber" in certain conditions. 1999 Va. Acts of Assembly, Chap. 916 (amending Va. Code § 15.2-1500 and adding Va. Code § 56-484.12). In reality, as a federal district court subsequently found, the limitations imposed

[8] Brenda Neideigh, *What Should be the Public Role in the Development of Advanced Network Infrastructure? An Analysis of Commonwealth of Virginia Restrictions on Municipal Telecommunications*, e-Corridors Working Paper #1 (Jan. 2001), *at* http://www.ecorridors.vt.edu/papers/topic/policy/ec.wp1.pdf.

[9] Greg Edwards, *Utility Lobbyists Prevail Bill Says Localities Can't Offer Services to Residents, Firms*, Richmond Times-Dispatch, Mar. 14, 1998 (quoting Del. Stump).

[10] Pamela Stallsmith, *Veteran Lobbyist Kept Up the Pace*, Richmond Times-Dispatch, Mar. 22, 1998.

on selling "dark fiber" were so "severe" that the exception was itself a barrier to entry.[11] In fact, not one potential purchaser of "dark fiber" sought to take advantage of the exception.

In the 2002 legislative session, however, the Virginia General Assembly reversed course. By that time, Judge Jones of the U.S. District Court for the Western District of Virginia had ruled that the Virginia barrier-to-entry statute was preempted by section 253(a).[12] More importantly, telecommunications companies had failed to keep the promises they made in return for the bar to local governments. As one newspaper explained, in the years since industry lobbyists convinced the legislature to "block localities from building and operating their own networks . . . [t]ele-communications companies, seeing few economic incentives, have been slow to extend high-speed and high-capacity technology outside of the state's bigger communities."[13]

The 2002 General Assembly passed S.B. 245, enabling local governments in some circumstances to provide telecommunications. 2002 Va. Acts of Assembly, Chap. 479. As its sponsor has explained the new law, the purpose of S.B. 245 was to promote economic development, educational opportunity, enhancement of medical services, and improve quality of life in areas not served or underserved

[11] *City of Bristol v. Earley*, 145 F. Supp.2d 741, 745 (W.D. Va. 2001).

[12] *See id.*

[13] Greg Edwards, *Gilmore Offers Tech Plan 'Digital Dominion' Would Unify Approach*, Richmond Times-Dispatch, Sept. 1, 2000.

by advanced communications services. The new legislation was also intended to foster competition where there was no functionally equivalent service, to promote better service at more affordable cost.[14] Among other things, the new law allows Virginia localities with their own electric distribution systems to provide telecommunications services within 75 miles of the boundaries of their electric service areas. Va. Code § 15.2-2160(A).[15]

There was nothing high-minded about the short-lived barrier-to-entry statute in Virginia. It was passed before any telecommunications company had lost a single customer who switched to obtain identical services from a local government. To the contrary, the goal of the local government projects was to provide services, particularly broadband services, that shareholder-owned companies were not providing, and in some places to provide competition for other types of services where there was none in the private sector. After local governments were locked out for four years, and the private sector still was not providing the services that Virginians were demanding, even some of the staunchest defenders of private enterprise in

[14] Memorandum of the Honorable William Wampler, Jr., in *Marcus Cable Associates, LLC v. City of Bristol*, Civil Action No. 1:02cv00197 (U.S. District Court for the Western District of Virginia, Dec. 9, 2002).

[15] Of the localities represented in this brief, the towns of Blackstone, Culpeper, Elkton, Franklin, Front Royal, Richlands, and Wakefield, and the Cities of Bedford, Bristol, Danville, Franklin, Harrisonburg, Manassas, Martinsville, Radford, and Salem have electric systems and therefore can claim the benefit of section 15.2-2160. The other locality, Abingdon, is the town located "adjacent to Exit 17" of Interstate 81, and therefore exempt from any bar to providing telecommunications under Va. Code § 15.2-1500(B).

the Virginia legislature were willing to concede that the law needed to be changed for the public good.

3. Freed from the barrier-to-entry statute, local governments in Virginia are bringing competition and advanced services to parts of Virginia where the private industry has failed to act.

Six Virginia localities have filed for and obtained certification as local exchange carriers – Bristol, Martinsville, Danville, Front Royal, Manassas, and Salem. The local governments that are preparing to provide or providing services or testing potential projects are working with cutting-edge technologies, beyond what any private entities are selling to customers in any part of the state. These projects in Virginia disprove the claim that the involvement of local governments could slow the increased availability of new technologies.

In Bristol, Bristol Virginia Utilities is offering businesses and consumers voice, high-speed data, and video services over a fiber-to-the-home (FTTH) network.[16] As Virginia's Center for Innovative Technology explained in its report to the General Assembly on Virginia broadband from last November, "fiber currently offers the best long term, fastest, and most reliable solution."[17] Bristol is one example of why one report concludes: "Forget the RBOCs.

[16] *See generally About BVU Optinet*, *at* http://www.bvu-optinet.com/about.htm.

[17] Center for Innovative Technology, Final Report HJ163, *Advancing Affordable, High-Bandwidth Electronic Networks in Rural Virginia* (Nov. 30, 2002), *at* http://www.technology.virginia.gov/SecInfo/legReports/finalReportHJ163_021212.doc.

When it comes to playing a key role in North American fiber-to-the-premises rollouts, municipalities are the stars."[18] After only a few months, the broadband penetration for BVU's service is 14.4%, a figure which matches or exceeds 20 of the top 75 markets in the United States, according to a recent survey.[19]

In Manassas, the City is experimenting with providing Internet services over the power lines. The case of Manassas demonstrates that even communities within commuting distance of large cities may be unserved or underserved by private telecommunications companies. Manassas is within 30 miles of the District of Columbia. Its pilot project brings a 500k Internet connection to home users over their electric lines. In the words of F.C.C. Chairman Powell, the broadband-over-powerline networks that are being tested in Manassas and elsewhere "are a testament to the incredible innovations taking place in broadband network technologies."[20]

In addition, these same localities are participating in regional economic development projects. Virginia's Tobacco

[18] Mary Jander, *Grass Roots Fiber Booms*, Light Reading (Oct. 6, 2003), http:// www.lightreading.com/document.asp?site=lightreading&doc_id=41363.

[19] *See* http://www.scarborough.com/scarb2002/press/pr_broadchart.htm (last visited Oct. 9, 2003) (showing 75 cities); Mike Still, *Consultant: BVU's OptiNet Plan on Track*, Bristol Herald-Courier, Aug. 26, 2003 (BVU penetration rate of 14.4%), *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770691994&path=/news/localnews&s=1054237353277.

[20] Separate Statement of Chairman Michael Powell, *Re: Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-XXX *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233537A2.pdf.

Commission exists in part to disburse funds from the National Tobacco settlement for the economic "revitalization" of specific areas in Virginia affected by the decline of the tobacco industry.[21] The Tobacco Commission recently awarded local governments and others over $4 million in grants for telecommunications projects. With funding from the Tobacco Commission, Bristol Virginia Utilities is working with the Cumberland Plateau Planning District Commission to bring new fiber-optic networks for business in Russell and Tazewell Counties.[22]

Similarly, LENOWISCO Planning District Commission is bringing fiber-optic connections to Scott County in rural Southwest Virginia. In some places, LENOWISCO was installing public water lines and fiber-optic data lines at the same time, using the same conduits.[23] Farther to the west, Lee County is still waiting for the next expansion to bring the fiber-optic connections to the westernmost county in Virginia.[24] On the border with Kentucky and West Virginia, Grundy is

[21] *See generally* The Virginia Tobacco Indemnification and Community Revitalization Commission, *at* http://www.vatobaccocommission.org/.

[22] Mike Still, *BVU, planning districts get $4.75 million boost to broadband efforts*, Bristol Herald-Courier, Aug. 5, 2003, *at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770358101&path=/frontpage; Charles Owens, *'Fiber-optic backbone' will revolutionize Tazewell, Russell economies*, Bluefield Daily-Telegraph, June 4, 2003, *at* http://www.zwire.com/site/news.cfm?newsid=8206343&BRD=2088&PAG=461&dept_id=346229&rfi=8.

[23] Caron Carlson, *Rural Areas to Get Broadband*, eWeek (June 2, 2003), *at* http://www.eweek.com/article2/0,3959,1114842,00.asp.

[24] Jeff Lester, *Lenowisco Hires Broadband Manager*, Coalfield Progress, Oct. 8, 2003, *available at* http://www.zwire.com/site/news.cfm?newsid=10285473&BRD=1283&PAG=461&dept_id=158544&rfi=8.

working with Virginia Tech on an experimental wireless project, and in the adjacent Dickenson County, the Dickenson County Wireless Internet project is just now getting underway, on a shoestring budget.[25]

In Danville, the economic "turnaround" from an economy based on tobacco and textiles has hinged on the government's decision to take "basic but essential steps" to enable new research industries to develop.[26] Danville is in the approval process for a fiber-optic network for local government needs, which through phased expansion "could eventually function as a platform for an expanded $37 million network that would provide telecommunications services to homes and businesses."[27] Danville's "transformation" has been cited as a "rare example of a community using tobacco settlement money as it was intended."[28]

The role of local governments in the projects funded by the Tobacco Commission highlight the fundamental difference between local governments and other kinds of entities that provide telecommunications services. Economic

[25] Kathy Still, *Dickenson County Goes Wireless*, Bristol Herald-Courier, Oct. 14, 2003, *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031771538662&path=/news/localnews&s=1054237353277; John DeWitt, *The Battle Over Broadband*, American City & County, Apr. 1, 2003, http://www.ecorridors.vt.edu/news/topic/policy/broadbandbattle.shtml.

[26] John Peters, *Rebuilding Danville: Job retraining and research capacity keep this mill town ahead*, Virginia Business, Apr. 2003, at 20.

[27] Victor Reklaitis, *Council*, Danville Register & Bee, Sept. 30, 2003.

[28] Associated Press, *Technology Boom Reaches Virginia County*, (Mar. 31, 2003), *available at* http://www.govtech.net/news/news.phtml?docid=2003.03.31-45307.

development is the primary goal of local government's telecommunications. The Tobacco Commission projects are geared at improving the depressed economies of particular areas of Virginia – the same areas which shareholder-owned companies might view as least likely to be profitable places for new services.

4. The differences between government service providers and private companies support the conclusion that all kinds of "entities" including local government are necessary to achieve the competition and services that Congress intended.

In its amicus brief, Sprint overstates the special advantages to local governments in providing telecommunications services. Just as local governments have assets, incumbent carriers have assets, and competitors seeking to enter the telecommunications market often must rely on the assets of the incumbent carriers, which they are notoriously reluctant to share. Bristol, Virginia, sits adjacent to Bristol, Tennessee; the state line is at the center of the main street of the two cities. When Bristol, Virginia began offering cable television services, the franchise holder cut prices in Virginia but not across the street in Tennessee.[29] Local governments have no advantage to compare with the ability of monopolists to charge

[29] Minutes of Bristol Tennessee City Council Meeting (Nov. 5, 2002), *at* http://www.bristoltn.org/Agendas/NOV502~1.doc ("City Manager Tony Massey said that Charter's lowered rates in Bristol, Virginia, but not Bristol, Tennessee, was a source of concern by both Council and citizens.").

more where they have no competition, and use those funds to cross-subsidize their efforts to defeat competition in other areas.

Some complaints about the advantages of local governments have nothing to do with their "government" status. Incumbent carriers are the only ones with the "must-carry" obligations – all competitive local exchange carriers (or "CLECs"), whether public or private, are exempt from this restriction. Incumbent carriers complain inevitably of any advantages the law confers on their competitors. Unlike most CLECs, however, local governments are not trying to resell the use of the networks of private companies – local government projects involve building new networks, to provide different and better services than what the private sector is offering. In fact, local governments provide "open access" to their networks, as in Bristol where another Internet service provider uses the City's network.

The differences between local governments and shareholder-owned companies also explain why local governments are willing to spend money for investments that would never make sense on Wall Street. Most of the Virginia localities participating in this brief have populations of 20,000 or less – government in these locations operates on a first-name basis. The concerns of the voters and rate-payers in the towns and cities of Virginia are jobs and opportunity, and not the rate of return on investment. Local governments must be willing to take a longer view of the future than the investing public might tolerate of shareholder-owned companies, where the stock price and profit margin is scrutinized every day. Market fluctuations and shortages of venture capital heighten this difference, with the result that only local governments with their local priorities and willingness to endure lower rates of

return over longer time frames will make the investment necessary for advanced services in rural areas.

Sprint argues in its amicus brief that government service providers are less efficient. The history of municipal-owned utilities in Virginia and elsewhere is to the contrary; after more than 50 years, municipalities remain providers of electric service precisely because of their ability to provide efficient service. Further, in many cases, these municipal utilities already have the technical expertise in fiber optic and/or advanced digital technology in their work with monitoring and protection systems related to their electric distribution networks. For example, in Danville, the City has constructed, operated and maintained a fiber optic network for five years as part of its Supervisory Control and Data Acquisition ("SCADA") system for utility monitoring and control and to meet intra-municipal communications needs, the City of Bristol began its network serving municipal offices in 1999, and government facilities in the City of Martinsville are connected to the fiber-optic cable of the Martinsville Information Network.

Finally, and most importantly, the common element in all the municipal network projects in Virginia is that local governments are not getting into the business of telecommunications just to steal the customers and profits of companies like Sprint and Verizon. The goals of local government have to do with jobs and the economy. Even if it would be unfair for the law to give a private firm all the purported advantages of local government, local government is not a private firm. It is a different kind of entity, with different priorities, but an entity nonetheless. Protecting the right of local government to provide telecommunications where the private sector fails to serve or

underserves the community is an important way of achieving the specific goals of Congress when it passed the Telecommunications Act.

CONCLUSION

The Virginia localities ask this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*

SOUTHWESTERN BELL TELEPHONE, L.P., FKA SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, Et Al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR CONSUMER FEDERATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF CONSUMER FEDERATION OF AMERICA AS AMICUS CURIAE

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.[1] CFA appears regularly before federal, state, and municipal, legislative, judicial, and administrative bodies, including the Federal Communications Commission ("FCC") and local franchising bodies. CFA's members include consumers interested in promoting effective and viable competition in the provision of telecommunications services.[2]

Vigorous competition among telecommunications service providers, including municipally-owned entities, benefits consumers by yielding lower prices, better service, and increased innovation. Consumers should not be asked to wait for private providers to saturate densely populated and more profitable markets before turning to less profitable areas.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that the preemption authority contained in Section 253(a) of the

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[1] Additional information concerning CFA is available online at the organization's website, the address of which is www.consumerfed.org. (URL accessed October 21, 2003.)

[2] Pursuant to Rule 37.3, consents of counsel for the Petitioners and Respondents have been obtained and filed with the clerk of the Court. Pursuant to Rule 37.6, no counsel for any other party has authored this brief, in whole or in part, and no person or entity, other than the amicus or its counsel, has made monetary contributions to the preparation or submission of this brief.

Telecommunications Act of 1996 ("the 1996 Act")[3] extends to state-imposed bans on the provision by municipal governments of telecommunications services. A central purpose of the 1996 Act was the promotion of meaningful competition, not the protection of competitors.

Bans on municipal entry protect neither consumers nor taxpayers, and inhibit the formation of much-needed competition. In many small and rural communities across the country (and even in many major markets), consumers continue to wait for benefits that such competition could bring. Instead of meaningful competition, consumers are faced with escalating prices charged by and inadequate service received from incumbent providers. In addition, the same incumbent providers resist competition by implementing monopolistic practices that make it difficult for fledgling competitors to succeed. State-imposed prohibitions on municipal entry into telecommunications may prevent residents of small and rural communities from having access to the advanced telecommunications services that are essential in order to be able to participate fully in today's society.

Incumbents' campaigns against municipal competition rely on commentaries by organizations sponsored by the very incumbent providers who would gain through prohibition of municipal competition.[4] In short, the purpose of the 1996 Act was to create competition in the provision of telecommunications services. Competition is not created by excluding an entire class of competitors. Moreover, there are

[3] 47 U.S.C. § 253 (2000).

[4] For example, the Progress and Freedom Foundation, whose commentary is cited in the briefs of Sprint and of the United States Telecom Association *et al.*, lists BellSouth, Comcast, SBC Communications, Sprint, the Telecommunications Industry Association, United States Telecom Association, and Verizon Communications as contributors. See http://www.pff.org/supporters.htm. (URL accessed October 21, 2003.)

measures far less restrictive than outright prohibition that can be implemented to address legitimate concerns, if any, about municipal provision of telecommunications services.

ARGUMENT

I. THE GOAL OF THE TELECOMMUNICATIONS ACT OF 1996 IS TO PROMOTE COMPETITION, NOT TO PROTECT COMPETITORS

As this Court has made clear, anti-trust laws "were enacted for the protection of *competition*, not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).[5] This Court's decisions concerning the relationship of anti-trust laws to competition and competitors are also applicable to the pro-competitive goals of the 1996 Act. The 1996 Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, 110 Stat. 56 (1996). Thus, the 1996 Act was neither intended to favor any single class of competitors, nor to permit prohibitions of one class of potential competitors from participating in the market.

Similarly, Section 706 of the 1996 Act directs the FCC and the states to encourage the deployment of advanced telecommunications capability on a reasonable and timely

[5] See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115 (1986). ("The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust laws, since it resulted only from continued competition."); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 n.14 (1984).

basis.[6] In both its *Second* and *Third Advanced Services Reports*, the FCC cited municipal provision of telecommunications service as evidence of how viable competition encourages deployment of advanced services.[7] The FCC specifically identified Muscatine, Iowa as an example of a locality that had been successful in bringing high-speed advanced services to a rural community. *Second Report*, at ¶ 113. The FCC credited the state of Iowa's legal environment, which encourages municipal entry, for contributing to the high level of advanced services deployment. *Id.* at ¶ 140. Indeed, even private providers acknowledge the important role that publicly-owned utilities can play by serving as a source of potential competition, and thereby encouraging rapid deployment of advanced telecommunications services.[8]

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[6] See 47 U.S.C. § 157 nt. Section 706(b) directs the FCC to report regularly on the availability of advanced telecommunications capability through initiation of a notice of inquiry. Section 706(c) defines advanced telecommunication capacity as "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data graphics, and video telecommunications using any technology."

[7] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, FCC 00-290 (rel. Aug. 21, 2000) (*Second Advanced Services Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, FCC 02-33 (rel. Feb. 6, 2002) (*Third Advanced Services Report*).

[8] See AT&T Corp. Comments filed in CC Docket No. 98-146 (Sept. 24, 2001) at 8.

The FCC -- which erroneously found that Section 253 did not preempt state bans on municipal entry -- recognized unanimously that municipal provision of telecommunications services furthers the pro-competitive purposes of the 1996 Act. *In re Missouri Municipal League, et al.*, 16 F.C.C.R. 1157, ¶ 10 (2001). The FCC likewise determined that absolute prohibitions on municipal provision of telecommunications services hinders, rather than enhances, the deployment of advanced services to small or rural communities. *Id.* The FCC had reached the same conclusion four years earlier, stating that

> "[W]e encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in PURA95. Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services."

In re The Public Utility Commission of Texas, et al., 13 F.C.C.R. 3460, ¶ 190 (1997).

The brief of petitioner Southwestern Bell Telephone and the amici briefs of Sprint and the United States Telecom Association, Verizon, BellSouth, and CenturyTel ("USTA Brief") advance arguments that are aimed at promoting their positions as dominant competitors, contending that municipal competition imposes burdens they should not be required to bear. Specifically, Sprint complains (Brief at 24) that municipal entry inevitably requires private providers to participate in costly state legislative and regulatory proceedings. The claim that incumbents believe they need to protect themselves in legislative and regulatory proceedings involving potential competitors hardly advances Sprint's cause. The 1996 Act was not enacted to perpetuate monopolies or to ease the burdens upon monopolist service providers. Further, Sprint's decision to participate in those arenas is its business choice. The deployment of advanced

services through competition and lower prices should not be compromised merely because the existence of such competition may prove inconvenient to incumbent providers.

Similarly, Sprint proves nothing in claiming that bans on municipal telecommunications service providers are justified because private sector companies have "invested in local communities." (Sprint Brief at 1) If Sprint has in fact constructed a robust local network and is prepared to offer residents a full range of advanced services at competitive prices, then it should have nothing to fear from either public or privately-owned competitors.

The reality is that the picture is very different from the one painted by Sprint. It is private industries' inadequate investment and poor service in many communities that has created a gap that municipal providers are willing to fill in order to ensure that their citizens are not left behind.[9] In July 2002, the Benton Foundation published a study in which it found that

> Significant divides still exist between … rural and urban households. For people in these communities, the enormous social, civic, educational and economic opportunities offered by rapid advances in information technology remain out of reach.

Bringing a Nation Online: The Importance of Federal Leadership at 3.[10]

Large gaps in Internet use remain between high and low-income consumers. The Benton Foundation study reported

[9] See David Armstrong and Dennis K. Berman, *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 for discussion of Tacoma, Washington's Click! Network and Glasgow, Kentucky's fiber-optic system.

[10] The Benton Foundation study is available at http://www.benton.org/publibrary/nationonline/bringing_a_nation.pdf. (URL accessed October 21, 2003.)

that cost was a primary factor behind many consumers not having Internet access available in their homes. *Id.* at 7. With prices for broadband service escalating, the cost barrier for advanced telecommunications services will further limit access for low-income consumers. The cost barrier also is a factor limiting some businesses' ability to subscribe to advanced services. *Third Advanced Services Report*, FCC 02-33, ¶ 97.

A traditional role of government has been to provide essential services to citizens when competitive markets fail to do so.[11] The reasons underlying the emergence of municipal telecommunications providers are strikingly similar to those that gave rise to publicly-owned electric utilities at the turn of the century. Publicly-owned utilities first emerged in small towns that were unable to attract private providers. In the late nineteenth century, electricity was seen as more of a novelty than a necessity, but soon it came to be viewed as an essential commodity directly linked to a community's economic survival. Many rural communities were left with the choice of forming a government-owned electric utility or being left in the dark.[12] Similarly, high-speed Internet access, while viewed as a novelty only a few years ago, now has come to be viewed as an essential element necessary for communities to create economic, employment, and educational opportunities.

The *Wall Street Journal* reported that "rural home owners" and "low-spending phone users" may not benefit from lower prices that competition can bring, citing the then-president of operations at SBC Communications' acknowledgement that, "[t]here is a large percentage of telephone customers that

[11] Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 Rutgers Computer and Tech. L. J. 1, 24 (1999).

[12] *Id.*

nobody wants to serve … It is unrealistic to think that every customer is attractive to the marketplace."[13] In its *Third Advanced Services Report*, the FCC found that most areas outside of major metropolitan areas do not have multiple advanced telecommunication service providers.[14] In areas where competition exists, business and residential consumers have realized the benefits of lower costs for such services that their counterparts in single provider areas have not.[15] In such an environment, it makes little sense to prohibit municipalities from providing a competitive yardstick against which to measure service furnished by incumbents and from providing citizens access to essential telecommunications services that would otherwise be unaffordable or unavailable.

II. THERE ARE LESS RESTRICTIVE MEASURES SHORT OF OUTRIGHT PROHIBITION THAT STATES CAN EMPLOY TO PROTECT CONSUMERS AND TAXPAYERS

The FCC has considered the various and oft-repeated objections raised by incumbent providers to municipal entry. The Commission has found that, to the extent such concerns are reasonable, they can be addressed through means short of outright prohibitions. As the FCC has explained:

> We continue to recognize … that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry.

[13] Stephanie N. Mehta, *In Phones, the Number is Four*, Wall St. J., Mar. 8, 1999, at B1.

[14] *Third Advanced Services Report* at ¶ 97.

[15] *Id.*

In re Missouri Municipal League, et al., 16 F.C.C.R. 1157, ¶ 11 (2001) (footnote omitted).

There is ample protection for both consumers and competitors in the language of Section 253. While Section 253(a) preempts a state's ability to prohibit municipal entry, the three parts of Section 253 do not exist in isolation. Section 253 preserves the authority of states to safeguard consumers and promote competition on a competitively neutral basis. Section 253(b) preserves a state's regulatory authority to "impose, on a competitively neutral basis … requirements necessary to … protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

The argument that municipal entry disadvantages private competitors is equally misplaced. Local governments do not regulate telecommunications providers, contrary to the assertions of amici Sprint and USTA *et al.* (Sprint Brief at 20-21; USTA Brief at 17-19) That is the province of state public utility commissions and the FCC. Section 253(c) correctly recognizes that local governments have authority over the management of public rights-of-way, but requires that such management must be on a competitively neutral and non-discriminatory basis. There is no basis for incumbent competitors to assume that local management of public rights-of-way will automatically or necessarily favor municipal providers. Indeed, a review of the cases cited in the USTA Brief (at 18-20) demonstrates that incumbent providers have been able to pursue successful litigation when and if they are able to show overreaching by local

governments.[16] CFA notes that none of the cases cited in the USTA Brief addressing municipal regulation of public rights-of-way involved municipalities that were providing telecommunications services as a competitive provider.[17] Contrary to the assertion (Sprint Brief at 20-21) that rights-

[16] See, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001, *cert. denied, City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001).

[17] Not only is USTA *et al.'s* reliance on those cases misplaced for purposes of this proceeding, but their brief also misconstrues case law addressing the permissible level of rights-of-way usage fees. The discussion in *City of Auburn v. Qwest* relied upon by USTA *et al.* (Brief at 18) regarding rights-of-way fees stands in marked contrast to the more measured decisions of other courts. In *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-625 (6th Cir. 2000), the Sixth Circuit upheld the city's imposition of a revenue-based fee of 4% of the provider's gross revenues as "just and reasonable" pursuant to Section 253(c). In analyzing the Ninth Circuit's decision in *City of Auburn*, the Second Circuit in *TCG New York v. City of White Plains* observed that, "the Ninth Circuit declared in passing that 'non-cost-based fees' are 'objectionable,' but only after concluding that other, non-severable aspects of the local ordinances ... required preemption. Thus, the Ninth Circuit's statement about 'non-cost-based fees' could be described as dicta." *TCG New York v. City of White Plains*, 305 F.3d 67, 78 (2nd Cir. 2002) citing and quoting *City of Auburn*, 260 F.3d at 1179 and n. 19. Moreover, *City of Auburn v. Qwest* follows a line of several earlier district court decisions, several of which have been vacated. See *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded*, 212 F.3d 863 (4th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999), *vacated and remanded*, 243 F.3d 928 (5th Cir. 2001); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997) *vacated and remanded*, 235 F.3d 241 (5th Cir. 2000); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001); and *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, 24 (E.D. Pa. Dec. 20, 1999).

of-way fees amount to forced-subsidization of municipal competitors, such fees are essential for the preservation of a finite public resource. Rights-of-way fees help ensure the safety and viability of public streets to the benefit of service providers and taxpayers alike.[18]

Incumbent providers also argue without empirical evidence that a municipal provider has an unfair advantage over its privately-owned competitor because a municipal provider pays no taxes and benefits from cross-subsidization. (Sprint Brief at 17-25; USTA Brief at 21-22; See also Southwestern Bell Telephone Brief at 18) The "support" offered by Sprint and USTA *et al.* for these claims consists of advocacy "studies" and commentaries conducted on behalf of industry-sponsored organizations.[19] Specifically, in place of

[18] See National League of Cities and National Association of Telecommunications Officers and Advisors, *Local Government Officials Guide to Telecommunications and Rights of Way* (2002).

[19] See footnote 4 *infra*. Jeffery Eisenach, who authored *Does Government Belong in the Telecommunications Business?* (cited in USTA Brief at 16 and Sprint Brief at 17), is the president of the Progress & Freedom Foundation. *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network* is listed as a Progress and Freedom Foundation publication on the organization's website and is available at http://www.pff.org/publications/pop9.7guppyclick.pdf. (URL accessed October 21, 2003.) Further, *Incentives for Anticompetitive Behavior by Public Enterprises* (cited in Sprint Brief at 21) was written on behalf of the AEI-Brookings Institute for Regulatory Studies. The AEI-Brookings Joint Center is sponsored, in part, by Verizon. Ronald Rizzuto, co-author of *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Overbuilds* (cited in Sprint Brief at 22), conducts industry-funded studies of municipal cable systems. See David Armstrong and Dennis K. Berman, *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1. Mr. Rizzuto was also a consultant for a number of incumbent cable providers. See http://www.coloradonano.org/ronrizzuto.htm. (URL accessed October 21, 2003.)

quantifiable evidence, Sprint cryptically refers to "hidden subsidies" that are "impossible to quantify" as justification for the drastic remedy of preventing municipal governments from providing a competitive alternative to incumbent providers. (Sprint Brief at 24-25, citing Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 15 (Jan. 2001), at http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (URL accessed October 21, 2003.)

Publicly-owned telecommunications service providers do not pay state or federal income taxes because they are non-profit entities that do not earn taxable income. However, such entities do make other payments to state and local governments in lieu of the taxes paid by privately-owned entities. Moreover, Sprint and USTA *et al.* ignore that investor-owned telecommunications providers benefit from substantial tax incentives that dramatically lower their costs.[20] The two major tax incentives available to investor-owned providers are accelerated depreciation and investment tax credits. In 2000, this resulted in a reduction of approximately 4 billion tax dollars to the U.S. Treasury. Additionally, these tax benefits lowered the cost of doing business for investor-owned providers by $5.7 billion.[21]

Both Sprint (Brief at 18) and USTA *et al.* (Brief at 20) also complain about the ability of local governments to issue tax-free or reduced-interest loans to raise capital. This claimed advantage is a result of Congressionally-enacted public policy, just as are the tax benefits accorded to investor-owned companies. There is no sound reason to apply Section 253 in

[20] See MSB Energy Associates, *Major Tax Breaks for Investor-Owned Telephone Companies in the Year 2000* (Jan. 2000), at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/newsroom/releases/msbreport.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

[21] *Id.* at v.

a manner that would disturb such policies, or to allow tax policy to defeat the requirement that no state statute or regulation may prevent competition. Any unwarranted imbalance created by tax benefits or rights-of-way fees can be resolved through legislation, rather than implementing an outright ban on municipal entry.

The sweeping claims that municipally-owned providers of services are inherently less efficient and chronically dependent on tax subsidies is folklore. Municipal electric utilities have been examined in approximately a dozen studies. Kwoka's comprehensive review of these studies finds no support for the tax subsidy claim advanced by both Sprint and USTA *et al.*[22] Findings on costs and prices are mixed, but the most frequent finding is that municipal providers pass lower costs through to the public in the form of lower prices.[23]

One of the primary reasons that the folklore does not withstand close scrutiny is that it fails to consider that economic organizations can be motivated to achieve efficiency for reasons other than profit. Thus, municipally-owned utilities that are providing basic necessary services

[22] John Kwoka, Power Structure: Ownership, Integration, and Competition in the U.S. Electricity Industry (1996); John Kwoka, *Governance Alternatives and Pricing in the U.S. Electric Power Industry*, 18 J.L., Econ. & Org. 278 (2002). Earlier literature reaching similar conclusions includes Jack P. Grove, *The Municipal Utility and the Liberal Economic Ethic*, 30 Case W. Res. L. Rev. 267 (1980); William G. Shepherd, *Regulation, Entry and Public Enterprise, in* Regulation in Further Perspective: The Little Engine That Might 17 (William G. Shepherd and Thomas G. Gies eds., 1974); William G. Shepherd, Economic Performance Under Public Ownership (1965); Richard Hellman, Government Competition in the Electric Utility Industry: A Theoretical and Empirical Case Study (1972).

[23] Kwoka, 1996.

can be just as strongly motivated to achieve efficiency in order to achieve output maximization.[24]

This is especially important in an environment where private, for-profit entities have resisted providing access to their local telephone networks, as evidenced by a remarkably long seven year struggle to achieve market opening under section 271 of the 1996 Act. Incumbent telecommunications providers' resistance to providing non-discriminatory access to advanced telecommunications services is readily apparent in efforts to pass legislation which would excuse them from the obligation of nondiscriminatory access.[25]

In an environment where facilities-based competitors are few and far between, publicly-owned entities are especially attractive to consumers because they serve as a competitor that is committed to serving the public. The claim that publicly-owned systems have an unfair advantage overlooks the immense advantage that more than a century as the incumbent telephone monopoly has conferred on local telephone companies. These were amply described in the decision of the FCC to reject the first section 271 application. The decision set forth in detail the competitive advantages the local telephone companies have in entering the long distance market compared to other companies entering the local market. These advantages include a history of legal barriers, economic and operational barriers, the fully deployed, ubiquitous network of the incumbents which

[24] Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980); Richard Steinberg, *Nonprofit Organizations and the Market, in* The Nonprofit Sector: A Research Handbook (Walter W. Powell ed., 1987); Burton A. Weisbrod, *Institutional Forms and Organizational Behavior, in* Private Actions and the Public Good (Walter W. Powell and Elizabeth Clements eds., 1998).

[25] See, *e.g.* Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001) (commonly referred to as "Tauzin-Dingell").

lowers their incremental cost of entering other markets, the need for interconnection, and strong brand recognition. [26]

[26] Federal Communications Commission, *Memorandum Opinion and Order In the Matter of Application by Ameritech Michigan to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, at ¶ ¶ 11,12, 15, 17 (rel. Aug. 19, 1997).

> For many years the provision of local exchange service was even more effectively cordoned off from competition than the long distance market. Regulators viewed local telecommunications markets as natural monopolies, and local telephone companies, the BOCs [Bell Operating Companies] and other incumbent local exchange carriers (LECs), often held exclusive franchises to serve their territories. Moreover, even where competitors legally could enter local telecommunications markets, economic and operational barriers to entry effectively precluded such forays to any substantial degree...
>
> An incumbent LEC's ubiquitous network, financed over the years by the returns on investment under rate of return regulation, enables an incumbent LEC to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own network components. Additionally ... Congress recognized that ... no competitor could provide a viable, broad-based local telecommunications service without interconnecting with the incumbent LEC...
> Indeed, given the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors.
>
> Significantly, however, the 1996 act seeks not merely to enhance competition in the long distance market but also to introduce competition to local telecommunications markets. ... Unlike BOC entry into long distance, however, the competing carriers'

Finally, Sprint's claim that municipal telecommunication projects often fail is ideological rhetoric, not an accurate portrayal of municipal involvement. (Sprint Brief at 22). Public and private entities measure success in different ways. Additionally, like their private counterparts, it is not essential that public projects generate positive returns in initial stages. Rather, other factors such as economic development and educational opportunities are valuable commodities for municipal governments.[27] Additionally, with community-owned telecommunications services, "the community has a voice every step of the way," in other words, municipal entry results in "local people mak[ing] local decisions."[28]

Sprint cites (Brief at 19 and 22) an advocacy commentary written by Paul Guppy in support of its erroneous contention that government entry into telecommunications markets

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> entry into the local market is handicapped by the unique circumstance that their success in competing for BOC customers depends upon the BOCs' cooperation. Moreover, BOCs will have access to a mature, vibrant market in the resale of long distance capacity that will facilitate their rapid entry into long distance and, consequently, their provision of bundled long distance and local service. ... New entrants into the local market, on the other hand, do not have available a ready, mature market for the resale of local service or for the purchase of unbundled network elements.

[27] See *Munis Take Broadband Success Stories to Capitol Hill*, Public Power Weekly, No. 40, at 12 (Oct. 6, 2003). Available at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/news/success.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

[28] American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), available at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/Telecom%20Fact%20Sheet_1-2003.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

fail.[29] In his commentary, Mr. Guppy charges that increased costs for the Click! Network fiber system in Tacoma, Washington resulted in a 50% surcharge in local electric bills. This unsupported claim has been refuted by Click! Network.[30] According to Click!, the surcharge was initiated because of the extraordinary high costs of electricity resulting from the energy crisis impacting California and the Pacific Northwest.[31] At the beginning of the crisis, Click! was already constructed and Tacoma Power had over $100,000 in cash reserves. Because of the unusual conditions resulting from the energy crisis, the $100,000 was not sufficient, and the surcharge was necessary.

Part of the motivation behind the establishment of the Click! Network was that the two telephone companies operating in the utility's service area at that time, were having difficulty were experiencing difficulty keeping up with customer requests for both broadband access and even basic dialtone access. By early 1999, Tacoma Power was providing broadband access to businesses within 15-30 days, while the telephone companies were taking several months to respond to similar requests.[32] Click!'s commercial revenues

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[29] Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, Progress & Freedom Foundation (Feb. 2002).

[30] See Diane Lachel's statement on the Tri-City Broadband website, available at http://www.tricitybroadband.com/failures.htm. (URL accessed October 21, 2003.) Counsel for CFA contacted Diane Lachel, the Government and Community Relations Manager at Click!, to verify the content of her statement, as set forth on the Tri-City's website. Ms. Lachel's statement on the Tri-City website was echoed in *Utility Lines*, a bill insert provided in customers' bills.

[31] *Utility Lines*, Tacoma Power (March/April 2001).

[32] Paul Sommers and Deena Heg, *Spreading the Wealth: Building a Tech Economy in Small and Medium-Sized Regions*, The Brookings Institution Center on Urban and Metropolitan Policy (Oct. 2003). Available at

are covering its operating expenses.[33] Incumbent providers have responded to the new competition by lowering prices and expanding their services. Residents in what was once an underserved market are now paying 10-20% less for expanded channels and services.[34]

Glasgow, Kentucky was an early leader of public sector involvement in communications markets and is an example of the benefits that such involvement can bring to a community. Glasgow's municipal power utility, Electric Plant Board ("EPB"), began offering cable services in 1989 in response to criticisms about the incumbent cable provider. In response to the lower prices offered by EPB, the incumbent lowered its prices.[35] According to Billy Ray, EPB's superintendent, EPB was funded initially by bonds and later by revenues. At no point have EPB's operations been funded by taxes. Today, residents of Glasgow can receive broadband access for one of the lowest rates in the country.[36]

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http://www.brookings.edu/es/urban/publications/200310_Sommers.pdf. (URL accessed October 21, 2003.)

[33] See Ms. Lachel's statement on the Tri-City Broadband website.

[34] American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services*.

[35] Ed Gubbins, *Why You Can Get the Best Deal on High-Speed Access in Glasgow, Kentucky*, Telephony Online (Dec. 9, 2002). Available at http://telephonyonline.com/ar/telecom_why_best_deal. (URL accessed Oct. 21, 2003.)

[36] *Id.*

CONCLUSION

For the foregoing reasons, the Consumer Federation of America respectfully requests this Court to reject the claims of Sprint and U.S. Telecom *et al.* and affirm the decision of the Eighth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY), NIXON,
ATTORNEY GENERAL OF MISSOURI,
Petitioner,

- AND -

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES,
Petitioner,

- AND -

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* UNITED TELECOM COUNCIL IN SUPPORT OF RESPONDENTS

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STATEMENT OF QUESTION PRESENTED

1. Whether Section 253(a) of the Communications Act of 1934 authorizes the FCC to preempt state barriers to entry against municipal providers of telecommunications.

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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* [1] UNITED TELECOM COUNCIL IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

The United Telecom Council ("UTC") respectfully submits this brief as amicus curiae, pursuant to Rule 37 of the Rules of this Court, in support of Respondents.

[1] In accordance with this Court's Rule 37.6, UTC respectfully states that this brief was authored entirely by counsel for the named *amicus curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

The United Telecom Council ("UTC") is the global trade association for the telecommunications and information technology interests of the utility, pipeline and other critical infrastructure industries. The membership of UTC is composed of large investor-owned utilities that serve millions of customers to small municipal utilities and cooperatively organized utilities that serve only a few thousand customers each. The Missouri statute at issue in this case prevents municipal utilities from offering telecommunications services themselves or telecommunications equipment to other competitive carriers. As such, the interests of UTC are directly affected through the municipal utility members that are subject to Missouri jurisdiction. Moreover, the instant appeal will have an indirect impact upon the interests of UTC to the extent that other states enact similar restrictive laws modeled after the Missouri statute. Therefore, UTC submits its brief as amicus curiae in support of the Respondents pursuant to Rule 37 of the Rules of this Court. The parties to the appeal have consented to the filing of the brief in accordance with Rule 29(a).

SUMMARY OF ARGUMENT

Section 253 of the Communications Act, 47 U.S.C. § 253, plainly applies to "any entity", public or private. Both the text of Section 253 and congressional intent manifested by the legislative history, structure and overall purpose of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, unmistakably direct the FCC to promote competition by preempting state barriers to entry that prohibit or have the effect of prohibiting the ability of any entity to provide an interstate or intrastate telecommunications service. When Congress meant to preserve state authority it did so expressly in Sections 253 (b) and (c), 47 U.S.C. §§ 253(b) and (c), which make no exceptions to the mandate of Section 253(a) for municipal providers of telecommunications. Therefore,

given the mandate of Section 253(a) and absent any contrary indication elsewhere in the Act or otherwise, the FCC must preempt the Missouri statute at issue here, Mo. Rev. Stat. §392.410(7)(West Supp. 2003), and others like it that prohibit telecommunications services by municipal utilities.

Congress intended to eradicate such barriers to entry in order to promote telecommunications competition and universal service. Municipal utilities are located in many unserved or underserved areas and possess the resources and expertise to provide telecommunications on either a retail or wholesale basis. Congress acknowledged this, and sought to encourage them to provide telecommunications, at least on a wholesale basis, by ensuring that such service offerings would not entail common carrier regulations. Moreover, it emphatically opposed explicit prohibitions on entry by a utility into telecommunications. Finally, preempting such state restrictions would encourage investment by municipal providers of telecommunications, consistent with Congress's overarching goal of promoting a "pro-competitive deregulatory national policy framework". *See* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 1 (1996) (*Conference Report*). Such investment would contribute to economic growth and improve the social welfare in many remote areas served by municipal utilities.

I. Section 253(a) Plainly Authorizes The FCC To Eliminate Barriers To Entry That Prevent *Any* Entity From Providing Interstate Or Intrastate Telecommunications Service

Section 253(a) grants the FCC broad powers to preempt State telecommunications laws or regulations restricting or even discouraging *any* entity from providing *any* telecommunications service. These broad powers are qualified only to the limited extent as provided in subsections (b) and (c). Furthermore, subsection (d) mandates preemption of any such laws or regulations that violate subsection (a) or (b).

Therefore, Section 253 speaks clearly, affirmatively, and with limited express exceptions about the federal-state balance concerning *per se* or *de jure* barriers to telecommunications competition. Federal authority preempts them.

Yet, the FCC attempts to create doubt about its authority despite the broad powers conferred by Section 253. *In the Matter of The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities. Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, Memorandum Opinion and Order, CC Docket 98-122, FCC 00-443, 16 FCC Rcd. 1157 (2001) (*Missouri Order*). It claims that it is not clear that Congress considered or intended the FCC to intrude on state sovereignty by preempting such restrictions, and asserts that it can effectuate Section 253(a) without interpreting it to apply to municipal entities. *Id.* To the contrary, the FCC would not effectuate Section 253(a) without protecting municipal telecommunications, which serves the FCC's twin goals of promoting competition and fostering universal service. Nor is it required that the federal law mention the particular application explicitly in order to apply. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). It simply needs to be plain to anyone reading the Act that Congress intended to alter the federal-state balance in the relevant area. *Salinas v. United States*, 522 U.S. 52 (1997).

By both the ordinary meaning and the context of the terms of Section 253, *any entity*—public or private—may seek preemption of state laws that prohibit or have the effect of prohibiting them from providing telecommunications services. *Missouri Municipal League v. FCC*, 299 F.3d 949 (2002); *accord, City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001). The term "entity" has been broadly defined to include governmental as well as private organizations, not only by the court below, but by the FCC as well. *Id., citing*

Black's Law Dictionary 553 (7th ed. 1999); *and see In re Amendment of Commission's Rules and Policies Concerning Pole Attachments*, Order on Reconsideration, 16 FCC Rcd. 12101, 12133-34, ¶ 59 (2001), *aff'd., Southern Co. Servs. v. FCC*, 313 F.3d 574, 580-581 (D.C. Cir. 2002) (explaining that "attaching entities" in the context of Section 224(e)(2) includes any physical attachment by a government entity, citing Congress's use of the "more general term and more inclusive term 'entity' and 'entities'"); *accord, Georgia Power Co. v. Teleport Communications Atlanta*, 2003 WL 2222863 (11th Cir. 2003).

This broad view of the term "entity" is underscored by the preceding modifier "any", which the courts and the FCC have also interpreted expansively. *See Salinas*, 522 U.S. at 57 (stating that "the word 'any,' which prefaces the [clause at issue], undercuts the attempt to impose [a] narrowing construction.") *and Implementation of Section 703(e) of the Telecommunications Act*, Report and Order, 13 FCC Rcd. 6777, ¶¶ 30, 40 (1998), *rev'd Gulf Power Co. v. FCC*, 208 F.3d 1263 (2000), *aff'd. National Cable & Telecomms. Ass'n., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (broadly construing "any" attachment by a cable television operator or telecommunications service provider); *and Southern Co. v. FCC*, 293 F.3d 1338, 1349 (11th Cir. 2002)(plain meaning of "any" is "all" unless specifically limited in statute). Thus, the term "any entity" should apply broadly to municipal utilities that provide telecommunications.

Petitioners and their amici take a narrow view, relying on *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002). *Raygor* declined to construe broadly the term "any claim" in 28 U.S.C. §1367(d) to apply to a dismissal of a pendant state law claim against a nonconsenting state on Eleventh Amendment grounds. *Raygor* was largely influenced by *Pennhust State School and Hospital v. Halderman*, 465 U.S. 89 (1984), which held that the Eleventh Amendment bars the adjudica-

tion of pendent state law claims against nonconsenting state defendants in federal court. It explained that "[o]n its face, subsection (d) purports to apply to 'any claim asserted under subsection (a),'" but given the holding in *Pennhurst*, it could not read Section 1367(d) in isolation to apply broadly to more than the few grounds for dismissal that were expressly contemplated in the context of the statute as a whole.

This case is distinctly different from *Raygor*. Section 253 answers any doubts about the federal-state balance by generally authorizing the FCC to preempt state barriers to entry against public and private telecommunications providers. "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I of the Constitution." *Salinas*, 522 U.S. at 60, *quoting United States v. Albertini*, 472 U.S. 675 (1985). Given that private entities may avail themselves of Section 253, the Eleventh Amendment would not prevent public entities from doing the same. *Alden v. Maine*, 527 U.S. 706, 756 (1999) (distinguishing for purposes of sovereign immunity between (a) a lawsuit brought by the Federal government and (b) a lawsuit brought by a private person: permitting the former but not the latter.) Moreover, if Congress had intended to preserve State restrictions on municipal telecommunications providers it would have done so expressly in subsections (b) and (c), which it did not. As such, "any entity" may be read broadly to include public as well as private providers of telecommunications, and any authority reserved to the states must be strictly limited to the express provisions of subsections (b) and (c).

II. Congress Clearly Intended To Encourage Both Public And Private Utilities To Provide Telecommunications

The scope of the application of Section 253(a) is informed by its legislative history. The term "any entity" originated in the 103rd Congress, in Section 230(a)(1) of the Senate

bill entitled S. 1822. As Congress explained in the report accompanying that bill, it defined certain key terms, such as "telecommunications service" and "telecommunications carrier" to apply broadly to "*all* entities" or "*any* provider of telecommunications service"—including explicitly electric utilities—unless those utilities offered solely bulk fiber optic capacity. S. Rep. No. 103-367, 103d Cong., 2d Sess. at 56 (1995) (*Senate Report on S. 1822*) (emphasis added). More importantly, this exception for bulk fiber capacity was carried over in the context of then-Section 230 to apply specifically to "*State and local governments*", so that they "may sell or lease capacity on these facilities to some entities and not others without violating the principle of nondiscrimination." *Id.* (emphasis added). Therefore, Congress did expressly consider electric utilities as "entities" for purposes of the definition of a "telecommunications service", and it specifically identified municipal utilities in the context of then-Section 230. In each separate provision, Congress sought to encourage electric utilities to provide telecommunications by exempting their wholesale bulk capacity offerings from regulations or restrictions that might otherwise apply.

Sections 103 and 703 of the Telecommunications Act of 1996 reinforce indications in the legislative history that Congress intended to remove barriers that would prevent all utilities from providing telecommunications. *See* 5 U.S.C. § 34 and 47 U.S.C. § 224. Section 103 provides an exemption for "registered holding companies" under the *Public Utility Holding Company Act of 1935 (PUHCA)* that enables them to offer telecommunications and other communications services through affiliates. Congress explained that Section 103 was intended to encourage utilities to enter the marketplace by allowing affiliates of registered holding companies to compete on the same basis as all other electric utilities. *Senate Report on S. 1822*, at 3. Congress also added Section 703(g), which requires utilities that provide telecommunications to impute the costs of their pole attachments,

further indicating that Congress anticipated that utilities would provide telecommunications. Note that pole attachments is the only context in which Congress distinguished between public and private utilities, exempting from regulation a "utility" that is owned by the Federal Government—or any State—which it defined as "any State, territory or possession of the United States, the District of Columbia, or *any political subdivision, agency or instrumentality thereof.*" *See* 47 U.S.C. §§ 224(a)(1), (3). Therefore, in the context of the Communications Act as a whole, Section 253 should apply to state barriers that prevent municipal utilities from providing telecommunications.

Indeed, municipal utilities have answered Congress's call to provide telecommunications, particularly in rural areas. In fact, nineteen of the eighty-eight municipal utilities in Missouri alone currently offer telecommunications. *See* American Public Power Association, *2003 Annual Directory & Statistical Report*. Furthermore, at the end of last year 511 public power systems offer some kind of broadband services. Of those, many either lease fiber optic capacity or serve municipal data networks, which typically do not compete on a retail basis with private carriers. *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), at http://www.appanet.org/legislativeregulatory/broadband/CommunityBroadbandFact.pdf. (*Community Broadband Fact Sheet*). Still, many others provide cable modem, local or long distance services that typically compete with carriers on a retail basis. *Id.*

By providing telecommunications on a retail or wholesale basis, municipal utilities are able to offset some of the costs of deploying communications infrastructure that support their core electric services. Moreover, such services make efficient use of capacity that may be available on utility networks. Finally, as they tend to serve rural areas, even the FCC

recognizes that "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." *Missouri Order*, 16 FCC Rcd. at 1162. These benefits not only reduce rates and improve the quality of commercial communications service, but also enable municipal utilities to improve the efficiency and reliability of the essential electric services that they provide to the public at large. As such, allowing states free reign to prohibit municipal utilities from competing in the telecommunications marketplace frustrates Congress's overarching goal of the Telecommunication Act of 1996 as a whole "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all markets to telecommunications competition." *Conference Report*, at 1.

CONCLUSION

For the foregoing reasons, UTC, as *amicus curiae*, respectfully requests that the Court affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY), NIXON,
ATTORNEY GENERAL OF MISSOURI,
Petitioner,

and

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

and

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS, IN SUPPORT OF THE RESPONDENTS

The amici curiae, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, and the United States Conference of Mayors, file this Brief in Support of the Respondent the file this Brief in Support of the Respondents, and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The amici consist of organizations representing local government officials throughout the United States. Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the Untied States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from the parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interest of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3066 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The amici's interest in this case arises from their efforts to protect local government abilities to provide the best possible economic development tools for individual communities. Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) ("Telecommunications Act"), to promote competition in the delivery of telecommunications services. Many local governments serve communities that are too small or too distant from major population centers to attract private

entities capable of supporting broadband communications services. If these communities are to survive and thrive, they must have affordable access to the same advanced telecommunications services and capabilities widely available in metropolitan areas. These local governments cannot afford to wait for profit-maximizing telecommunications providers to turn their attention to rural areas.

A growing number of local governments, particularly those that operate their own electric utilities, have stepped forward to fill service gaps left by the private sector. They have done so either by providing telecommunications services themselves or by constructing telecommunications infrastructure and facilities to attract competitive providers to their communities. Upholding the Eighth Circuit's ruling paves the way for many more local governments to do the same.

SUMMARY OF THE ARGUMENT

Section 253 (a) of the Telecommunications Act of 1996 states without ambiguity that State actions prohibiting any entity from providing telecommunications services are to be preempted. The amici do not reach this conclusion lightly. In addition to the express language of the statute, the legislative history of the Telecommunications Act shows that Congress intended the phrase "any entity" to be all-encompassing and actively considered the need for public entities to provide telecommunications services.

ARGUMENT

First and foremost, the amici disfavor federal preemption of state and local government actions unless such preemption is essential to achieve a "clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In particular, the amici support the principle enunciated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), that a federal statute should not be construed to preempt traditional state or local powers unless Congress has made its

intent unmistakably clear in the language of the statute. This case presents one of those rare instances in which congressional language mandates federal preemption. This case does not require the Court to preempt a broad class of State action, but only those narrow actions which prohibit, or have the effect of prohibiting, local governments from providing telecommunications services. Amici *do not* argue or accede that Section 253 of the Telecommunication Act of 1996, 47 U.S.C. § 253(a) (1996), preempts all state or local actions. The Section must be evaluated in light of the facts of each individual case.

The facts of this case make clear that Missouri's express prohibition of the provision of telecommunications services by local government entities must be preempted. A variety of local governments have established public communications systems that contribute greatly to the economic development, educational and occupational opportunity, and quality of life of their residents. Unfortunately, State barriers to local government entry deny many other communities the ability to obtain prompt and affordable access to the full benefits of the "Information Age," which Congress intended them to have in enacting the Telecommunications Act. These benefits, including the ability to attract new businesses and retain existing ones, the ability to create attractive educational and employment opportunities, the ability to foster improved health care at lower cost, and the ability to create an environment in which residents can enjoy a high quality of life, rest on timely and inexpensive access to information and communications.

As former Federal Communications Commission Chairman Kennard cautioned Congress:

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is—the

> network of our national community. . . . We must always be looking for ways to remove barriers to investment and to promote competition. I am particularly concerned about deployment in rural areas and in inner cities. Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. But today's Report suggests that in the very short term, demand for high bandwidth will really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.

Report on the Deployment of Advanced Telecommunications Capability to All Americans, 14 F.C.C.R. 2398, CC Docket No. 98-146, (February 2, 1999) (Separate Statement of Chairman Kennard). Former Chairman Kennard's statement foreshadowed the situation many communities face today. Those communities which desire to do so must be allowed to correct the "Digital Divide" that separates them from communities which are thriving in this new "Information Age."

I. THE LEGISLATIVE HISTORY OF SECTION 253(a) CONFIRMS THAT CONGRESS INTENDED THE PHRASE "ANY ENTITY" TO INCLUDE LOCAL GOVERNMENTS

Section 253(a) of the Telecommunications Act, 47 U.S.C. § 253(a) (1996), allows "No State or local statute or regulation, or other State or local legal requirement, [to] prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service" (emphasis added). The 104th Congress adopted this provision verbatim from Section 230(a) of the 103rd Congress's bill S.1822. Therefore, the legislative history of Section 253(a) begins with the history of S.1822, a point with which the Federal Communications Commission

(FCC) agreed in *City of Abilene v. Federal Communications Commission*, 164 F.2d 49 (D.C. Cir. 2000).

A. 103rd Congress' Understanding of "Any Entity"

Congress understood and intended that the preemption language that became Section 253(a) allow "any" entity to provide telecommunications services. During the 103rd Congress, representatives of local government associations and public power utilities educated Congress by bringing to light their members' willingness to provide telecommunications services themselves and their willingness to make their telecommunications infrastructure and facilities available to potential competitors of incumbent providers.

For example, the Senate learned of the Glasgow Electric Plant Board (GEPB), in Glasgow, Kentucky. The GEPB brought its small rural community into the Information Age and exceeded the achievements of the private sector in many larger communities. Prior to the GEPB's entry into the telecommunications market, a single, for-profit cable company served Glasgow. The citizens, unhappy with the quality and the price of the service, asked the local government-owned electric system for help. The GEPB obliged. The end result was a system that provided twice as many television channels as the competing, for-profit cable company, with lower rates and better service, in addition to a system which allowed consumers to purchase electricity in real time (allowing for energy cost savings). In response, the private company dropped its rates and improved its service. Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Statement of William J. Ray, on behalf of the American Public Power Association, 1994 WL 232976) at 351-61, ("*Senate Hearings on S.1822*").

The superintendent of the GEPB, William J. Ray, provided the Senate with a first-hand account of the GEPB's achievements and success. Mr. Ray presented written and oral testimony on behalf of the American Public Power Association. The text of a portion of that testimony, detailing the history, achievements, and goals of the project, is reproduced below.

> In the 1980s, Glasgow, a community of 13,000 residents, was served—but not very well—by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates—and delivered better service to boot. Big surprise—the private company decided to drop its rates by roughly 50 percent and improve its service, too.
>
> But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries.

> Soon this service will allow banking and shopping from home, as well as access to all local government information and databases. We are now providing digital telephone service over our system. That's right—in Glasgow, everyone can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.
>
> The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.

Senate Hearings on S.1822, 1994 WL 232976 at *7. The GEPB experience showed that local government entities could provide access to the "Information Age," and could do so in a way that furthered Congress' pro-competitive ambitions. Mr. Ray also outlined for the Senate that different communities and public entities, specifically utilities, faced different needs, and Congress' desire for rapid advanced telecommunications deployment should not mandate one single model for all.

Mr. Ray noted that some public entities desired to follow in GEPB's footsteps and provide competitive telecommunications services themselves. Others would likely choose to simply provide their telecommunications infrastructure to telecommunications providers. Mr. Ray impressed upon the Senate the need to accommodate both groups and impressed upon the Senate the vital role public entities would play in achieving the goal of vigorous competition. Again, set out below is a portion of Mr. Ray's testimony:

> While all electric utilities have telecommunications needs, the manner in which these needs are met differs greatly among public power systems. Some public power systems satisfy their communications requirements primarily by leasing capacity from third parties. Other APPA members rely on communications systems

> built only to satisfy their own needs. Still others have built communications systems using some capacity on those systems for their own internal needs and leasing excess capacity to others (acting as the owner of a conduit rather than a telecommunications or information service provider). Finally, some public power communities have built communications systems to serve their own needs and to provide other telecommunications and information services to community residents and businesses.
>
> It is APPA's desire to ensure that whatever legislation is enacted, the diverse needs of the public power communities can be met. Specifically, this means that for those utilities who are likely to lease space over facilities owned by a third party, reasonable access terms, conditions and rates are required. For utilities that will develop and operate communications systems for their own use or to provide conduit but not content service to others, legislation should not saddle them with common carrier obligations. Nor should legislation place obstacles in the path to public ownership of new telecommunications facilities or the public provision of telecommunications services. Indeed, the goals of universal service and vigorous competition can be enhanced if such public ownership and involvement is encouraged.

Senate Hearings on S. 1822, 1994 WL 232976 at *5. Senator Trent Lott (R-MS) later remarked, "I think the *rural electric associations, the municipalities, and the investor-owned utilities, are all* positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." *Senate Hearings on S.1822* at 378-79 (emphasis added). This statement shows that Congress understood the pivotal role local governments could play in developing telecommunications services.

Additional support for the congressional understanding of the need local government and public entity participation in telecommunications service provision is found in the Senate Report on S.1822. Summarizing the major features of the bill the Report recognizes that S.1822 allows all utilities to provide telecommunications services. The report states:

> Entry by electric and other utilities into telecommunications
>
> S. 1822 allows *all* electric, gas, water, [steam], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a)).

S. Rep. No. 103-367, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063 at *22, ("*Senate Report on S.1822*"). "Section 302," referred to in the parenthetical above, contained various measures to promote competition and the "new Section 230(a)" contained the preemption language which later became Section 253(a) of the 1996 Telecommunications Act. The language regarding the provision of services by public entities and the preemption of explicit barriers to competition were wedded in Congress' contemplation of what eventually became the Telecommunications Act of 1996.

Other aspects of the legislative history also show that Congress intended for "any entity" to include local governments. For instance, the inclusion of all entities in the "any entities" phrase is shown by Congress' treatment of certain investor-owned electric utilities.

Specifically, the consideration given to public electric utilities shows Congress' intent to allow for public entity participation. The Public Utility Holding Company Act of 1935 ("PUHCA") was enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. Part of the PUHCA prohibited covered electric utilities from entering into lines of business outside their core electric functions.

However, to ensure that these electric utilities would be treated like other electric utilities under the Telecommunications Act, Congress was willing to remove these PUHCA restrictions. As the Senate Report on S.1822 explained, electric utilities had experience in the telecommunications arena and were capable of competing effectively as market participants in the provision of telecommunications services. The Senate Report outlined:

> [E]lectric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics.
>
> * * *
>
> [R]egistered holding companies have sufficient size and capital to be effective competitors.

Senate Report on S.1822, 1994 WL 509063 at *10-11. The Senate noted in 1995 that under the PUHCA a registered holding company was generally able to own an internal telecommunications system necessary for control of power plants and other utility uses, but "it and its subsidiaries [were] limited in their ability to sell excess telecommunications capacity to other parties." S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995). The Senate also recognized that loosening these restrictions would *significantly promote competition*. Specifically:

> PUHCA restricts registered holding companies from investing in telecommunications infrastructure, specifically the construction of fiber optic links and other facilities for general service to the public. In addition, many end-use applications that could provide the incentive for investment in infrastructure construction may also exceed core utility functions and thus impede the ability of a registered holding company to invest. *As a result, registered holding companies may be precluded from competing in telecommunications and information*

> *markets, thus potentially limiting consumer choice and resulting in higher prices, unless current PUHCA restrictions are loosened with respect to investment in telecommunications infrastructure and applications. Entry by utilities could significantly promote and accelerate competition in telecommunications services and deployment of advanced networks.*

S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995). Discussing universal service and local competition, this Senate Report also described the legislation as reforming "the regulatory process to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and *electric utilities, as well as other entities*." S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995).

The Senate Report on S.1822 (in 1994) shows that the Congress followed Mr. Ray's suggestions. S. 1822 contemplated that public power utilities considering becoming telecommunications providers would be treated like all other providers of such services. The Senate Report also makes clear that S. 1822 allowed utilities to make available their infrastructure and facilities to telecommunications provers without themselves becoming telecommunications carries. This is evidenced by S.1822 definition of the term "telecommunications service" as *"the direct* offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services." *Senate Report on S. 1822*, 1994 WL 509063 at * 56 (emphasis added).

If the definition of "any entity" were as limited as the State of Missouri, the FCC, Southwestern Bell, and their amici argue, Congress' statements would be nonsensical. The recognition of utilities experience in the provision of the telecommunications services shows Congress actively

contemplated the contribution public entities could make to telecommunications, as does the recognition of utilities' size and capital.

The 103rd Congress ended without passage of new telecommunications legislation. But Congress' work on what was to become Section 253(a) of the Telecommunications Act was essentially done. There is little additional legislative history on this issue. What exists, corroborates that the 104th Congress understood and intended that the term "any entity" apply to local governments, particularly those that operate their own electric utilities.

B. The 104th Congress Also Understood "Any Entity" to Include Local Governments

As the 104th Congress considered the Telecommunications Act of 1996, it too understood any entity to include public, local government entities. During the floor debates in the Senate on June 7, 1995, Senator Lott summarized the major features of the Telecommunications Act. First, Senator Lott explained that PUHCA was being amended "to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Second, Senator Lott observed, "In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*. It limits the role of Government and increases role of the market." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

As a key sponsor and floor manager of the Telecommunications Act, Mr. Lott's statements are entitled to substantial weight. *Lewis v. United States*, 445 U.S. 55, 63 (1980) (Senator's statements as the sponsor and floor manager of the bill were entitled to weight); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (A

statement of one of the legislation's sponsors deserves substantial weight); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) (Sponsors inform the meaning of the statutory words).

The 104th Congress' understanding that Section 253(a) applied to all entities is supported by language in the final Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act. The Joint Explanatory Statement shows that Congress anticipated that public entities would choose to provide telecommunications services. Discussing utilities in particular, the Joint Explanatory Statement provides, in addition to safeguarding the rights of consumers of traditional telecommunications providers, States could also protect consumers of *other utilities* which provide telecommunications services:

> In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services.* Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section.
>
> H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 WL 46795 at *127 (1996) (emphasis added).

The Joint Statement included one vital and important caveat, crucial to the outcome of this case:

> ***However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.***
>
> H.R. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 WL 46795 at *127 (1996) (emphasis added).

The Report's discussion of a utility's *choice* in the matter of telecommunications provision exhibit's Congress intent to leave this

decision with the individual public entity, not with State governments. These statements, combined with the express statutory language preempting State actions which prohibit or have the effect of prohibiting the provision of telecommunications services by any entity, show the full extent of Congress' will to allow *all* entities to provide telecommunications services.

II. ANTI-COMPETITIVE ACTIONS OF TELECOMMUNICATIONS PROVIDERS SINCE THE ENACTMENT OF THE TELECOMMUNICATIONS ACT

The Telecommunications Act passed with wide support in both the House of Representatives and the Senate. Soon after the Telecommunications Act became law, however, the incumbent telecommunications providers began to thwart the pro-competitive purposes of the Telecommunications Act.[2] Incumbent providers introduced measures in several states to stop or significantly delay local government entry.

Some incumbents focused on obtaining outright prohibitions on local government entry into the market of telecommunication services provision. In addition to Missouri, they successfully persuaded the legislatures of several states to prohibit local government and public entities from providing telecommunications services. Other providers preferred a more subtle strategy, choosing to ignore the vast advantages of incumbency, and pretending to be

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[2]H. Frisby, Jr., and J. Windhausen, Jr., *Bell Companies Thwart Competition*, Charleston Gazette (September. 25, 2002), http://www.wvgazette.com/display_story.php3?sid=200209246&format=prn;

J. Glassman, *For Whom the Bells Still Toll*, Washington Times (April 25, 2001), http://www.aei.org/ra/raglas010425.htm;

AT&T News Release, AT&T Files Petition For Structural Separation of BellSouth, (March 21, 2001), http://www.att.com/news/item/0,1847,3720,00.html.

severely *disadvantaged* because of the supposed tax and regulatory advantages that local government utilities enjoy.

The goal of these state legislative efforts was to prevent local governments from entering the market as telecommunications providers. The *Wall Street Journal* commented on this trend, noting, "The companies figure that, stripped of their financial perks, cities would be less likely to enter the telecommunications market." J. Ball, *Georgia Cities Face Battle to Enter Telecom Area*, Online Wall Street Journal (March 26, 1997).

III. LOCAL GOVERNMENTS ACROSS THE COUNTRY ARE PROMOTING COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

One of the purposes of the Telecommunications Act was to "accelerate rapidly private sector deployment of telecommunications and information technologies." H.R. Conf. Rep. No. 104-458, 104 Cong., 2d Sess., 1996 WL 46795 at * 113 (1996), (Joint Explanatory Statement). Logic indicates, however, that the purpose of accelerating private deployment is not contrary to market entry by public entities. On the contrary, provision of telecommunications services by public entities has been instrumental in spurring private entities in several respects. Public participation stirs competition, provides incentives, and sometimes even provides resources to the private sector which would not ordinarily be available.

The State of Missouri asserts that the state legislators represent the will of the people of Missouri when enacting regulations preventing local governments from competing to provide telecommunications services to their residents. The State, however, overlooks the fact that the mayors, city and county council members, and other elected officials of local government also represent the will of the people. More often that not, residents have a much closer relationship with their

local elected officials than with state representative. Local officials who make decisions regarding the public provision of telecommunications services do not do so in a vacuum. They reach these decisions after extensive consultation with and comments from their constituency. The results of just two of many of those decisions are noted below.

Tacoma, Washington provides a prime example of local government successfully providing telecommunications services for the benefit of its community. The City is one of several providers of cable television services and one of two providers of high-speed internet access for the residents of Tacoma. The prices for both the cable television and internet services are lower than is found in areas where there is no competition as a direct result of Tacoma's entry into the market.[3] The City's entry into the market fulfilled the congressional goal of competition in telecommunications services embodied in the Telecommunications Act.

Kutztown, Pennsylvania also provides telecommunications services to its residents. Faced with charges from private telecommunications providers that its entry into the telecommunications market was a failure, the Borough of Kutztown has responded vociferously that its projects was instead a success. Initially, Kutztown sought to simply improve its infrastructure and partner with a large private telecommunications provider to bring its residents into the Information Age. The Borough was unable to find a private partner willing to share the burden of updating its system and thus entered the market as a provider. Today, Kutztown's residents enjoy significant monetary savings in addition to being able to access the latest technologies. Kutztown's experience has been such a success that it was recently

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[3] J. Glasner, Cities Deliver Broadband for Less http://www.wired.com/news/business/0,1367,57927-2,00.html.

awarded the Governor's Award for Local Government Excellence.[4]

These are but two examples of many success stories. Even these simple examples show that a vital and crucial method to Congress' goal of "accelerat[ing] rapidly private sector deployment of telecommunications and information technologies" is competition from the public sector. The public sector understands how to provide telecommunications services and is equipped to do so. Congress recognized these capabilities when it allowed "any entity" to provide service. Had it meant to exclude public entities, Congress would have preempted only those State regulations which prohibit "private entities" from providing services.

[4] http://www.inventpa.com/default.aspx?id=152.

CONCLUSION

Ultimately, this case is not about the successes stemming from any particular public local government entity's decision to enter the telecommunications market as a provider, though those successes validate Congress' actions. It is about congressional intent to ensure competition in the provision of telecommunications services. Congress specifically stated its intent to preempt outright prohibitions in the Telecommunications Act:

> No State . . . statute or regulation, or other State . . . legal requirement, may prohibit . . . the ability of *any entity* to provide any interstate or intrastate telecommunications service"

Section 253 of the Telecommunication Act of 1996, 47 U.S.C. § 253(a) (1996), (emphasis added). State statutes which expressly prohibit the provision of services by public, local government entities should be preempted.

Respectfully submitted,

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Petitioner,

-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
Petitioners,

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE HIGH TECH BROADBAND COALITION AND THE FIBER-TO-THE-HOME COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT

The High Tech Broadband Coalition ("HTBC") and the Fiber-to-the-Home Council ("FTTH Council") respectively submit this brief as *amici curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF *AMICI CURIAE*

Amici are leading national organizations that collectively represent the interests of every industrial sector participating in the deployment of advanced telecommunications services[2] – more commonly called "broadband" – in the United States. *Amici* advocate for public policies that promote broadband deployment and competition, because widespread broadband adoption is necessary to produce enormous societal and economic benefits for United States consumers, workers, and businesses.

The High Tech Broadband Coalition is an unincorporated industry alliance formed by the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software, and manufacturing sectors in the United States. The six trade associations that comprise

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part. No monetary contributions to the preparation or submission of this brief have been made by any person or entity other than *amici curiae* and their counsel.

[2] The Telecommunications Act of 1996 (the "1996 Act") defines the term "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Title VII § 706(c)(1) (reproduced in the notes under 47 U.S.C. § 157).

HTBC thus represent more than 15,000 corporations running the gamut of the high-technology industry, the continued success of which increasingly depend upon consumer adoption of broadband:

a. The Business Software Alliance ("BSA") is an international organization representing leading software and e-commerce developers in 65 countries around the world.

b. The Consumer Electronics Association ("CEA") represents companies that lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services. More than 1,000 member companies generate more than $90 billion in annual factory sales.

c. The Information Technology Industry Council ("ITI") represents the world's leading providers of information technology products and services, including computer, networking, data storage, communications, and Internet equipment, software, and services. In 2000, ITI member companies employed more than one million people in the United States and exceeded $668 billion in worldwide revenues.

d. The National Association of Manufacturers ("NAM") is the largest United States industrial trade association, with more than 14,000 members and 350 member associations in every industrial sector and all 50 States.

e. The Semiconductor Industry Association ("SIA") is the premier trade association representing the $102 billion United States microchip industry. SIA member companies account for more than ninety percent of United States-based semiconductor production.

f. The Telecommunications Industry Association ("TIA") is the leading trade association serving the communications and information technology industry, with proven strengths in standards development, domestic and international public policy, and trade shows. Through its worldwide activities, TIA facilitates business development opportunities and a competitive market environment. The association also provides a forum for its 700 member companies, the manufacturers and suppliers of products and services used in global communications.

While its members each serve as a major force for advocating the public policy objectives of their own members, HTBC was established to highlight their common interest in, and to ensure sustained advocacy for, public policies that promote broadband deployment and competition.

The Fiber-to-the-Home Council is a not-for-profit association of more than eighty companies and municipalities deploying fiber-to-the-home[3] ("FTTH") technology and services in the United States and around the world. Its members represent all areas of broadband industries, including telecommunications, computing, networking, system integration, engineering, and content providers, as well as traditional telecommunications providers, utilities, and municipalities. The FTTH Council was established in 2001 to educate the public on the opportunities and benefits of FTTH

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[3] The phrase "fiber-to-the-home" commonly denotes a particular kind of broadband architecture predicated on the use of fiber optic cables extended to end-user customer premises. While the infrastructure that supports the Internet, and some large businesses, already employ high-speed fiber optics, in the proverbial "last mile" between incumbent local exchange carriers ("ILECs") and end-users, copper wire telephone lines and lower-bandwidth broadband technologies predominate. Deploying FTTH loops enables higher bandwidth data communications in the last mile.

solutions, and to advocate policies that promote FTTH deployment.

Since 2000, the telecommunications sector in the United States has lost 600,000 jobs, and private deployment of next-generation broadband technologies has been insufficient. Deployment by municipalities and municipally-owned utilities, in contrast, has accelerated. *Amici* are thus acutely interested in this case, and urge the Court to affirm the Eighth Circuit's decision and interpretation of the phrase "any entity" in Section 253(a) of the 1996 Act to encompass both public and private entities.

SUMMARY OF ARGUMENT

As both Congress and the FCC have repeatedly recognized, the national deployment of broadband and other advanced telecommunications services is in the Nation's interest. Their conclusions are not surprising given the enormous benefits to be reaped through these new technologies, not only in terms of growth to the economy (a substantial factor alone, as numerous studies show), but also in terms of telemedicine, distance learning, telecommuting, and entertainment.

United Nations statistics show that the United States currently ranks eleventh in nationwide broadband penetration. Recent data also demonstrate that municipalities are an important link in enhancing penetration, especially in rural and less densely populated areas. Municipal entry into the telecommunications market has been enormously valuable in countless instances of deployment in areas that are not an investment priority for private sector providers. *Amici* recount just a handful of examples of the very real benefits that have obtained when municipalities have deployed broadband on behalf of their residents, not only in terms of additional valuable services, but also enhanced competition for existing services.

Precluding states from erecting barriers to municipal entry into the market for advanced telecommunications services is not only appropriate from a policy perspective, it is also legally the right result and consistent with Congress's intention when it enacted the 1996 Act. The legislative history plainly demonstrates that Congress carefully selected broad language, "any entity," when it described the scope of the competition it sought to protect. Moreover, the legislators, Senator Lott in particular, specifically focused on the importance of the utilities and expressly recognized the contributions of municipalities in this important area. Senator Lott summarized Congress's broad intent by stating that they were "construct[ing] a framework where everybody can compete everywhere in everything."

By protecting municipalities and municipally-owned utilities from state-imposed barriers to entry into the market for advanced telecommunications services, the Eighth Circuit's interpretation of Section 253(a) furthered Congress's express pro-competitive objectives in the 1996 Act, especially in rural and other markets too small to attract necessary private investment in such services. The decision of the court of appeals, as Congress intended, thus permits municipalities to perform the same critical role in the deployment of advanced telecommunications services as they played in the electrification of rural communities in the twentieth century.

ARGUMENT

I. MUNICIPALITIES AND MUNICIPALLY-OWNED UTILITIES ARE AN IMPORTANT AND IN SOME CASES CRITICAL FORCE DRIVING THE DEPLOYMENT OF BROADBAND IN RURAL AMERICA.

A. Wider Broadband Access to All Americans Will Create Enormous Economic and Societal Benefits.

Both Congress and the FCC have recognized the importance of the deployment of advanced telecommunications services to the public interest and welfare of the Nation. Section 706 of the 1996 Act directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Telecommunications Act of 1996, 110 Stat. 56, Title VII § 706(a)-(b) (reproduced in the notes under 47 U.S.C. § 157) ("Section 706"). If the FCC finds that such capability is not being deployed in a reasonable and timely manner, Congress further mandated the FCC to "take immediate action to accelerate deployment of such capability" through, among other measures, "regulatory forbearance" and "removing barriers to infrastructure investment." *Id.* Commenting on the value of broadband, Chairman Powell recently noted that "the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment."[4]

Widespread broadband adoption has the potential to transform the Nation's social, educational, and economic life.

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[4] *In re Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360, CC Docket No. 01-337, at 2 (rel. Dec. 20, 2001) (Separate Statement of Michael K. Powell).

Among others, it presents enormous opportunities in telemedicine, distance learning, e-government, telecommuting, e-commerce, and entertainment.[5] Broadband deployment, moreover, can serve as a powerful catalyst for strengthening and improving the United States economy, benefiting consumers and producers, employees and shareholders alike. *See generally* Robert W. Crandall and Charles L. Jackson, Criterion Economics LLC, *The $500 Billion Opportunity: The Potential Economic Benefits of Widespread Diffusion of Broadband Internet Access* ("*Potential Economic Benefits of Widespread Diffusion*") (July 2001) http://www.criterioneconomics.com/documents/Crandall_Jackson_500_Billion_Opportunity_July_2001.pdf (last visited Oct. 8, 2003). Yet, despite the importance of broadband to the Nation's competitiveness in the global marketplace, according to statistics published by the United Nations, the United States ranks eleventh in the world in broadband penetration, with just seven subscribers per every 100 inhabitants. *See* United Nations, International Telecommunication Union, *Top 15 economies by 2002 broadband penetration, 2002* (updated Apr. 4, 2003), http://www.itu.int/ITU-D/ict/statistics/at_glance/top15_broad.html (last visited Oct. 16, 2003).

Several recent studies have detailed the economic benefits of broadband deployment and wider nationwide access to broadband. The aforementioned July 2001 study by Drs. Crandall and Jackson estimated that universal adoption of broadband access could provide United States consumers with several hundred billion dollars in economic benefits per

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[5] *See generally* Telecommunications Industry Association, *The Economic and Social Benefits of Broadband Deployment*, at 9-28 (October 2003) ("*Economic and Social Benefits of Broadband Deployment*") http://www.tiaonline.org/policy/broadband/Broadbandpaperoct03.pdf (last visited Oct. 8, 2003).

year.[6] A June 2001 study by the Yankee Group predicted $223 billion in cost savings from universally available broadband in the United States.[7] A January 2002 study coauthored by scholars at the University of California at Berkeley, The Brookings Institution, and the Momentum Research Group found that improved efficiencies in business and government operating expenses in the United States already had saved nearly $155 billion, and had the potential of producing $500 billion in savings by 2010.[8] These actual and potential economic benefits, moreover, are by no means isolated to enterprise-sized organizations, "dot-coms," and traditional technology industries. Instead, "[o]rganizations of all sizes and across all industries have adopted Internet business solutions as a tool for lowering operating costs and increasing revenues."[9]

B. Municipalities Are An Important Link in Achieving Nationwide Broadband Access.

In its Third Report issued pursuant to Section 706, the FCC concluded that advanced telecommunications capability was, as of that time, on a national level, being deployed in a reasonable and timely manner. *In re Inquiry Concerning the*

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[6] *Potential Economic Benefits of Widespread Diffusion*, at 2. This study also found that accelerating broadband deployment would provide increased economic benefits. In particular, an acceleration of ubiquitous broadband availability is worth an estimated $500 billion to United States consumers and producers. *Id.*, at 54.

[7] *The Collaborative Commerce Value Statement: A $223 billion Cost Savings Opportunity Over Six Years*, Module B-to-B Commerce & Applications, Vol. 6, No. 6, Yankee Group (Boston, Mass., June 14, 2001).

[8] Hal Varian, Robert E. Litan, Andrew Elder, and Jay Schulter, *The Net Impact Study: The Projected Economic Benefits of the Internet in the United States, United Kingdom, France and Germany*, at 19 (Jan. 2002), http://netimpactstudy.com/NetImpact_Study_Report.pdf (last visited Oct. 9, 2003).

[9] *Id.*, at 4.

Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report, 17 FCC Rcd 2844, ¶ 1 (February 6, 2002) ("*Third Report*"). It also found, however, that only 37 percent of the most sparsely-populated outlying areas have access to high-speed service, and that "there continues to be a significant disparity in access to advanced services between those living in rural population centers and those living in sparsely-populated outlying areas." *Id.* ¶ 109. In many such areas, for example, digital subscriber lines ("DSL"), currently one of the most widely-used broadband technologies, cannot affordably be deployed in a manner that makes service available to all residents. Depending upon the DSL technology, a customer must be a maximum of 18,000 feet from a local telephone company's central office to receive DSL service. *See In re Verizon Telephone Companies*, 17 FCC Rcd 23598, ¶¶ 4-5 (Chief, Wireline Bureau, Nov. 18, 2002); *see also Third Report*, 17 FCC Rcd 2844, Appendix B, ¶¶ 27-29. In order to alleviate these distance limitations, a significant investment in remote facilities and fiber technologies must be made to bring the DSL enabling network closer to the customer's premises, which can be an investment barrier in rural and sparsely populated regions. The FCC has recognized that this distance limitation "has prevented DSL from being offered to all potential end-users and thus has impeded DSL deployment in more sparsely populated and remote locations." *See In re Verizon Telephone Companies*, 17 FCC Rcd 23598, ¶ 4 (Chief, Wireline Bureau, Nov. 18, 2002).

In commenting on the FCC's findings in its Third Report, moreover, the United States Department of Commerce, Office of Technology Policy, also noted that "smaller and rural

communities [were] seeing deployment less rapidly" than urban areas.[10] The Department of Commerce further warned:

> It is important to note * * * that the current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. Today's broadband will be tomorrow's traffic jam, and the need for speed will persist as new applications and services gobble up existing bandwidth. While long-haul data transport capacity exploded in the 1990s, last-mile capability upgrades have proceeded much more slowly.[11]

Indeed, as recently as August 21, 2003, the FCC found that deployment of one leading next generation of broadband technology – FTTH loops – "is still in its infancy." *In re Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* ("*Triennial Review Order*"), FCC 03-36, CC Docket Nos. 01-338, 96-98, and 98-147, at 164, ¶ 274 (Aug. 21, 2003). Based on information received from Corning, Inc., the FCC found that "only 47 communities throughout the nation currently enjoy widespread FTTH deployment." *Id.* Corning's estimates also indicated that, as of January 2003, municipalities had deployed more than 25% of all FTTH loops to homes. *Id.*, at 165 n.809. Indeed, municipalities had deployed 18,100 FTTH loops to homes, more than *forty-five times* the number deployed by Bell Operating Companies.[12] The rate of municipal deployment is,

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[10] United States Department of Commerce, Office of Technology Policy, *Understanding Broadband Demand: A Review of Critical Issues*, at 6 (Sept. 23, 2002), http://www.technology.gov/reports/TechPolicy/Broadband_020921.pdf.

[11] *Id.* (footnote omitted).

[12] Specifically, Corning estimated that competitive local exchange carriers ("CLECs") had deployed 44,890 FTTH loops to homes; small ILECs had deployed FTTH loops to 3,600 homes; Bell Operating Companies had deployed FTTH loops to only approximately 400 homes; and municipalities had deployed FTTH loops to approximately 18,100 homes. *Triennial Review Order*, at 165 n.809.

if anything, growing. An October 2003 study by Render, Vanderslice & Associates found that municipalities and municipally-owned utilities accounted for 32% of FTTH deployments. *See* Render, Vanderslice & Associates, *Fiber-to-the-Home the Third Network 2003/2004* (Oct. 2003).

Not surprisingly, the FCC has singled out utilities, "particularly municipal utilities in rural areas, [as] willing to build advanced telecommunications networks to offer a full range of services where incumbent cable operators and telephone companies are not." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26901, ¶ 13 (Dec. 31, 2002) ("*Ninth Report*"). Utilities have certain inherent competitive advantages that make market entry more attractive for them:

> [T]hey already own and operate rights of way and existing networks along which broadband-enabling infrastructure can be deployed. Moreover, in rural and remote areas where traditional telecommunications infrastructure may be lacking, utilities often have existing full coverage. Thus, the additional investment required to add broadband capability to these networks can be less than new network deployments, and it can serve the purpose of bridging the digital divide in many areas that may never see deployments using other platforms.[13]

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[13] *Economic and Social Benefits of Broadband Deployment*, at 26. The high cost of creating the necessary infrastructure to provide advanced telecommunications services is obviously significant in terms of attracting new entrants to the market. The economic attraction for new entrants is the possible return from that investment through sales to end users of a variety of voice, data, and video services. To the extent that Missouri and its *amici* are defending the right to block competition by noting the challenged statute's exception for municipalities that provide only

In addition, the FCC has recognized that utilities are uniquely positioned to deploy Broadband over Power Line ("BPL") technology, which uses electrical power lines to transmit high-speed communications. BPL is a particularly promising new type of broadband infrastructure "[b]ecause power lines reach virtually every community in the country." *In re Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems, Notice of Inquiry*, FCC 03-100, ET Docket No. 03-104 (rel. Apr. 28, 2003), ¶ 1. In particular, the FCC has stated that "BPL could bring Internet and high-speed broadband access to rural and underserved areas, which often are difficult to serve due to the high costs associated with upgrading existing infrastructure and interconnecting communication nodes with new technologies." *Id.* BPL is likely to be a cost-effective means for rural municipally-owned electrical utilities to provide broadband service to their communities.

A recent study[14] compiled the following examples of initiatives undertaken by municipalities and municipally-owned utilities across the country to deploy advanced telecommunication services:

> a. "Since early 2001, the city of Glenwood Springs, [Colorado,] has buried additional fiber optic material to carry broadband through Glenwood Springs * * * while laying electricity cables. The project cost $3 million, which came from the electric department's budget. As a result, Glenwood Springs was the first Colorado municipality to offer broadband Internet service on its

broadband for internet access, they ignore the practical realities arising from the industry economics. Simply put, in order to make competition in this market a reality, a company must be given access to all potential sources of revenue deriving from the costly investment in the infrastructure; limiting the return on the investment to one element, such as internet access alone, virtually ensures that market entry will not occur as it will not be economically viable.

[14] *Economic and Social Benefits of Broadband Deployment*, at 29-32.

> own network. Because of the network, a hospital in Glenwood Springs will be able to send x-rays to the Mayo Clinic in Rochester, Minnesota, and receive a response within 15 minutes, rather than the eight hours it took with dial-up service. Home mortgage applications will receive similarly quick treatment. Glenwood Springs' network combines Ethernet cable with antennas. Most customers receive and transmit their signals wirelessly, via antennas on their homes. Because of the network's success, the Colorado municipalities of Fort Morgan, Aspen, Carbondale, and New Castle have requested information and advice from Glenwood Springs on building their own networks.[15]"
>
> b. "LaGrange, Georgia, has four advanced broadband Internet networks, which are able to serve the entire city's businesses, residents and schools. It also has the LaGrange Internet TV Initiative, which offers free internet access to all city residents via cable television. It uses an enterprise-based government structure so that instead of collecting local taxes to provide services, it generates revenues by delivering services like electricity, water, sewer and telecommunications. The city's broadband network operations generate more than $1 million in revenue for the city each year.[16]"
>
> c. "The city of Kutztown recently completed work on Pennsylvania's first municipal fiber-optic network, a $4.6 million project, which the city began building in 2001. The network has created competition for high-speed Internet access, cable TV and telephone service in Kutztown. Service costs up to 20 percent less than similar offerings from other providers. Kutztown is one of only a

[15] Steve Caulk, *Glenwood rolls out high-speed Internet*, ROCKY MOUNTAIN NEWS, Aug. 5, 2002.

[16] *Georgia City Named One of Top Seven Intelligent Communities in the World*, GOVERNMENT TECHNOLOGY, July 2002.

handful of U.S. cities to run fiber to every home and business. Offering speeds up to 100 Mbps, the network will provide residents the ability to monitor home security, pay water and sewer bills and track their electricity use. Officials also envision video-on-demand and music-on-demand, distance learning and telemedicine as services to be deployed using the new fiber-optic network. In addition, the network will provide Kutztown's electric utility the ability to automatically detect the location of power outages and equipment failures. It also will let the utility use automated meter reading technology that will eliminate the need for time-consuming manual checks of the borough's 2,235 electric meters each month.[17]"

d. "The Grant County Public Utility District (GCPUD) is building fiber-to-the-home in a rural community in Washington state. According to the GCPUD, FTTH is assisting small businesses, educational institutions, medical facilities and other organizations where telecom services are offered in a limited capacity. * * * Nearly 100 percent of the homes have Internet access. At least 19 Internet service providers (ISPs), two video companies, one telephone company and one security company are providing high-speed voice, video and data services. The economic impact of the broadband buildout has been significant."

e. "Kitsap County, in Washington state, is a rural community that recognizes the need for broadband. The Kitsap County Public Utility District (KCPUD) is laying 110 miles of fiber optic cable, for a total cost of $4.5 million. KCPUD believes the network will lower prices and improve retail services for consumers through

[17] Christian Berg, *Wired in Kutztown – Municipality sells Internet, cable TV and phone service through its own lines*, ALLENTOWN MORNING CALL, Aug. 4, 2002, *available at* 2002 WL 22496571.

increased competition, reduce motor vehicle and individual travel expenses, and provide better, faster and cheaper public services.[18]"

f. "In 1997, the city of Tacoma, Washington, built a publicly funded $100 million fiber-optic network called Click! Network, linking homes and businesses to fast Internet connections. It connects every city block with the equivalent of a T3 [or 45 Mbps] line. Over the last four years, 100 new start-up businesses have been created as a result of the fiber-optic network. In addition, the University of Washington chose Tacoma as the location for a new campus known as the Washington Technology Institute as a result of the network.[19]"

In the United States, more than 511 publicly-owned utilities now offer telecommunications services to the public, an increase of nearly fourteen percent since 2002.[20] Indeed, in terms of deployment in rural areas, municipalities and municipally-owned utilities are a driving force. In bringing advanced telecommunications services to these communities, the public utilities are mirroring the function they performed when they first electrified the areas. While the private sector focused on electrifying more densely populated and profitable urban areas, rural communities filled the void by creating their own electric utilities. As the FCC has expressed (02-1386 Pet. App. 23a), public utilities are following the same path that they did when the electrified the nation at the

[18] Nancy Gohring, *Kitsap data 'pipe' half done; County hopes speedy Internet network will bolster economy*, SEATTLE TIMES, Jul. 31, 2002, at E1, *available at* 2002 WL 3907911.

[19] John Cook, *City of Destiny Begins to Stir Thanks in Part to the Digital Economy, Tacoma's Transformation Finally May Be Occurring*, SEATTLE POST-INTELLIGENCER, Aug. 16, 2000, at D1, *available at* 2000 WL 5301537.

[20] Brian Bergstein, *City-owned broadband networks fighting corporate telecom*, ASSOCIATED PRESS NEWSWIRES, Jan. 27, 2003.

beginning of the last century: they are once again are striving to ensure that their communities are not left behind as another technological revolution transforms the Nation's economy and society.

II. CONGRESS TAILORED THE 1996 ACT TO PROMOTE COMPETITION AND ACCELERATE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES TO ALL AMERICANS.

By giving the expansive phrase "any entity" in Section 253(a) its ordinary and natural meaning, and thus protecting municipalities and municipally-owned utilities from state barriers to entry into the market for advanced telecommunications services, the Eighth Circuit's decision in this case furthered Congress's goals for the 1996 Act. Congress spelled out its objectives in the legislation: to "promote competition" in the telecommunications market and to "encourage the rapid deployment of new telecommunications technologies" to all Americans. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

The 1996 Act advances these goals in a number of ways. It specifically mandates, for example, that the FCC and all states "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," and further requires the FCC to conduct regular inquiries to determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Title VII, § 706(a)-(b) (reproduced in the notes under 47 U.S.C. § 157) ("Section 706"). If the FCC determines that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely manner, the 1996 Act further charges the agency with taking "immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.*

Congress recognized, however, that its goals of robust competition and rapid deployment of advanced telecommunications technologies to all Americans could not be realized without eliminating all state and local barriers to entry. Thus, Congress provided, in Section 253(a), that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). By choosing the phrase "any entity," Congress signaled its clear intent that public entities, no less than private entities, not be precluded by state and local governments from competing in the telecommunications market or deploying advanced telecommunications services.

The legislative effort that culminated in the 1996 Act spanned both the 103rd and 104th Congresses. The legislative history of each makes clear that Congress understood and intended the 1996 Act to protect public entities from state and local barriers to entry.

During the 103rd Congress, the American Public Power Association ("APPA") and other representatives of public power utilities urged Congress to do everything possible to encourage such entities to participate in the deployment of what was being called the "National Information Infrastructure." At a Senate hearing on S. 1822 – the predecessor bill to the 1996 Act – William J. Ray, the superintendent of the Glasgow Electric Plant Board in Kentucky, presented written and oral testimony on behalf of APPA.[21] Mr. Ray advised Congress that "all electric utilities, whether owned by units of State or local government, organized as electric cooperatives, or owned by private investors, are ideally positioned to play a role in the

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[21] *The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Sci. and Transp.*, 103d Cong., 2d Sess., A&P Hearings S. 1822 (Westlaw), at *351-61 ("*Hearings on S. 1822*").

construction of the NII."[22] Shortly after Mr. Ray completed his testimony, Senator Trent Lott (R-MS), a member of the Communications Subcommittee of the Senate Commerce, Science and Transportation Committee, echoed Mr. Ray's testimony by stating: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[23] The Senate Report on S. 1822, in describing the import of the bill's preemption provision,[24] stated as follows: "allow[] all electric, gas, water, stem [sic], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a))."[25]

The 104th Congress constructed the 1996 Act on the groundwork laid by the 103rd Congress. The legislative history from the 104th Congress further confirms that it understood and intended that the term "any entity" to apply to local governments, particularly those that operate their own municipal electric utilities. During the floor debates in the Senate on June 7, 1995, Senator Lott, describing the Act's major features, summarized:

> In short, [the Act] constructs a framework where everybody can compete everywhere in everything.

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[22] *Hearings on S. 1822*, at *351-52, 353-54.

[23] *Hearings on S. 1822*, at *378-79

[24] The operative language of this provision – section 302, new section 230(a)(1), of S. 1822 – was identical to that of Section 253(a) in the 1996 Act, providing that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." S. 1822, 103d Cong. (2d Sess. 1994).

[25] S. Rep. No. 103-367, 103d Cong., 2d Sess. 22, 1994 WL 509063, A&P S. REP. 103-367 (1994).

Senator Lott further identified the purpose of amending the Public Utilities Holding Companies Act:

> to allow registered electric utilities *to join with all other utilities* in providing telecommunication services, providing the consumer with smart homes, as well as smart highways.[26]

The Eighth Circuit's interpretation of the term "any entity" in Section 253(a) to cover municipalities and municipally-owned utilities clearly serves Congress's pro-competitive agenda in the 1996 Act. The FCC itself has more than once expressed the view that market entry by such public entities would further the legislation's goals. Thus, while concluding that the D.C. Circuit's interpretation of Section 253(a) in *Abilene* dictated its decision in this case, the five FCC commissioners unanimously denounced the result as anticompetitive:

> While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities.

(02-1386 Pet. App. 23a (footnotes omitted).)

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[26] 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

The FCC also referred to its August 2000 report on the deployment of advanced telecommunications services, which presented a case study detailing the deployment of such services in Muscatine, Iowa. (*Id.*, 23a-24a.) In Muscatine, the municipal utility's deployment of broadband facilities to residential consumers prompted the telephone and cable companies to deploy their own high-speed services, thus giving residential customers three high-speed service providers. (*Id.*, 24a, 44a.) The FCC stated that this case study was "consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities." (*Id.*, 24a.) The FCC was also "encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives." (*Id.*, 25a.)

Writing separately, then FCC Chairman William E. Kennard and Commissioner Gloria Tristani emphasized their view that the outcome in the case, "while legally required, [was] not the right result for consumers in Missouri" because protection of municipal entry "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." (*Id.*, 42a-43a.) Chairman Kennard and Commissioner Tristani also indicated that the record in the FCC proceeding "contains many letters from Members of Congress that state unequivocally that it was the intent of

Congress when it enacted section 253 to enable any entity, regardless of the form of ownership or control, to enter the telecommunications market and that it intended to give the Commission authority to reject any state or local action that prohibits such entry." (*Id.*)

A third commissioner, Susan Ness, also wrote separately to "underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace." (*Id.*, 43a.) After observing that such a result was at cross-purposes with the 1996 Act, in which Congress "recognized the competitive potential of utilities," Commissioner Ness again emphasized that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas." (*Id.*, 44a.)

Given the strength and unanimity of the FCC's opinion, Petitioners and the *amici* supporting them have little choice but to concede that "municipal entry into telecommunications markets to compete with incumbent and competitive providers may appear pro-competitive on its face ..." (Brief of Sprint Corporation as *Amicus Curiae* in Support of Petitioners, at 3.) In their briefs, however, they nonetheless advance theories contending that municipal entry is unduly "risky" and creates the possibility of unfair competition from cross-subsidization, access to public funds, and regulatory discrimination against private providers. (Brief of the United States Telecom Association, *et al.*, as *Amici Curiae* in Support of Petitioners, at 17-24.) The FCC considered and rejected these contentions, however, finding that remedies less draconian than absolute prohibition against municipal

entry would address such concerns.[27] Surely no one would suggest that a potential for unfair competition – or isolated instances of unfair competition – in any other market would warrant compete preclusion of an entire class of competitors. Yet that is the very result Petitioners seek. The FCC wisely recognized that such an outcome is contrary to public policy. *Amici* respectfully submit that the outcome Petitioners seek is justified by neither policy nor law.

---

[27] Specifically, the FCC stated:

> We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

(02-1386 Pet. App. 25a-26a (footnotes omitted).)

CONCLUSION

The decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

SOUTHWESTERN BELL TELEPHONE, L.P.,
f/k/a Southwestern Bell Telephone Company,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF LINCOLN ELECTRIC SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress intended the term "any entity" in section 253(a) of the Telecommunications Act of 1996 to protect public as well as private entities from state barriers to entry into the telecommunications market.

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BRIEF *AMICUS CURIAE*

Lincoln Electric System submits this brief as *amicus curiae* under Sup. Ct. R. 37.3.[1]

INTEREST OF LINCOLN ELECTRIC SYSTEM AS *AMICUS CURIAE*

In enacting the Telecommunications Act of 1996 (Telecommunication Act), Congress sought to open up the local telecommunications market to increased competition from all comers. Lincoln Electric System (LES) is a municipal utility that has tried to utilize the competitive opportunities Congress envisioned in the Telecommunications Act, only to be stifled at every turn. Private industry incumbents have vigorously opposed LES' entry into the market and have thus far induced both the Nebraska Legislature and the Nebraska Public Service Commission (NPSC) to prohibit LES' efforts. This case will determine whether LES can continue to seek an opportunity to provide a competitive alternative to the incumbent private carrier.

Organized as an operating division of the City of Lincoln, Nebraska, LES currently provides electrical service to approximately 117,000 metered customers within Lincoln and a 195 square mile area in Lancaster County, where Lincoln is located. LES is governed by a

[1] The parties have consented in writing to the filing of this brief. Lincoln Electric System is the only entity to have paid for the preparation of this brief. Similarly, no counsel for a party authored any part of this brief.

board empowered under the Lincoln Municipal Code to use its property, personnel, facilities and equipment efficiently and effectively for the benefit of people living within its service area. Under Neb. Rev. Stat. § 86-119, LES is a governmental entity eligible to be a "telecommunications company."

LES has built and operates a network of electrical generation, transmission and distribution facilities. LES has also invested with other utilities in a 1500-megawatt generating plant in Wyoming called Laramie River Station. LES joins other municipal and cooperative utilities in the east to operate the Missouri-Iowa-Nebraska Transmission Line, an interregional 345 kilovolt transmission line to enhance regional reliability. LES also interconnects with the nation's interstate transmission grid as a member of the Mid-Continent Power Pool and the Midwest Independent Transmission System Operator.

The network of transmission lines LES maintains includes fiber optic lines that LES uses for monitoring and controlling the performance of its electrical facilities. This fiber optic transmission system has excess capacity capable of providing telecommunications service that LES has tried to put to productive use. In October 2000, LES applied to the NPSC for permission to operate as a telecommunications contract carrier within its existing Nebraska service area. LES intended to reach businesses and other governmental entities to offer them competitively priced telecommunications services, with the goal of encouraging local economic growth and development.

The application LES made was in response to the loss of a major employer in Lincoln. In May 2000, the Gallup Organization, which employs nearly 1,000 employees in

Lincoln, announced it needed a suitable location to build a $45 million training center. *See* Mark Anderson, *Gallup's expansion plans may include a move to Omaha*, LINCOLN JOURNAL STAR, May 21, 2000, at 1A. While the Gallup Organization had been in Lincoln for over 30 years, its Lincoln location had become disadvantageous because of limited air service and because there was only one telecommunications company to provide access to high volume long distance telephone service. *Id.* Lincoln could not overcome these disadvantages, and the Gallup Organization announced plans to relocate to a riverfront site in Omaha by 2004. *See* Mark Anderson, *Gallup to build on river*, LINCOLN JOURNAL STAR, Sept. 28, 2000, at 1A. With its application to the NPSC, LES hoped to prevent any other major employers from leaving the Lincoln area due to inadequate telecommunications services.

Though LES proposed to offer contract telecommunications services only within its existing service area, its application engendered vigorous opposition from many quarters. Besides the opposition of the incumbent telephone service provider, some 33 other parties intervened to oppose LES' application. The NPSC dismissed LES' application on two grounds. The agency held that no state statute specifically authorized LES to provide telecommunications services for-hire. Similarly, the NPSC concluded that Lincoln's home rule charter did not expressly grant LES authority to enter into the for-hire telecommunications business.

LES appealed the NPSC decision to the Nebraska Supreme Court. While the appeal was pending, the Nebraska Legislature interjected itself into the dispute. Bowing to intense lobbying from the incumbent telecommunications providers, the legislature enacted a ban on

any municipality or any other agency or political subdivision of the state from offering commercial telecommunications services. *See* 2001 Neb. Laws 827. Before the Nebraska Supreme Court, LES argued that section 253(a) of the Telecommunications Act preempted this statutory ban on LES' telecommunications initiatives.

The Nebraska Supreme Court agreed with LES' preemption argument. In a careful and thorough analysis of the issue, that court discussed the significance to LES' appeal of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Reviewing the federal precedent addressing the preemptive effect of 47 U.S.C. § 253(a), the Nebraska Supreme Court concluded that "Congress' use of the phrase 'any entity' in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally-owned utility, seeking to provide telecommunications services." *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 79-80, 655 N.W.2d 363, 372 (2003). Because the legislative prohibition did not fall within the safe harbors of 47 U.S.C. §§ 253(b) or (c), the court held that the state provision was preempted by federal law.

Despite agreeing with LES that Congress had preempted the effort of the Nebraska Legislature to ban municipalities from offering telecommunications services, the Nebraska Supreme Court agreed with the NPSC that LES lacked authority under Nebraska municipal law to offer telecommunications services on a for hire basis. Specifically, the court held that "the city of Lincoln had not, at this time, properly delegated authority to LES" to

provide telecommunications services for hire. *Id.* at 88, 655 N.W. 2d at 377.[2]

Following the Nebraska Supreme Court's decision, the Lincoln City Council has adopted an ordinance expressly authorizing LES to provide for hire telecommunications services. Lincoln, Neb., Code § 4.24.070(e) (2003). LES currently has a new application pending before the NPSC to implement what LES originally proposed in its October 2000 application. *In the Matter of the Lincoln Electric System Seeking Contract Carrier Permit Authority*, NPSC Application No. C-2910. A decision reversing the Eighth Circuit in this case will empower the Nebraska Legislature to prevent municipalities from providing much-needed competitive telecommunications services in the Lincoln area, and thus end LES' efforts toward fulfilling the promises of the Telecommunication Act.

SUMMARY OF ARGUMENT

With the Telecommunications Act Congress opened the existing telecommunications industry to greatly expanded competition. LES has tried to implement this goal with increased competition within its service area. Private telecommunications incumbents, cable providers

[2] While prevailing in the Nebraska Supreme Court, one intervenor petitioned for certiorari, as did the Nebraska Attorney General. This Court denied the two petitions for certiorari, presumably because the Nebraska Supreme Court had affirmed the NPSC decision on state municipal law grounds. *See Nebraska Pub. Serv. Comm'n v. Lincoln Elec. Sys.*, 123 S. Ct. 2620 (2003); *Nebraska Telecomm. Ass'n v. City of Lincoln*, 123 S. Ct. 2620 (2003).

and industry trade associations have all opposed LES and other public utilities whenever they can, and in Nebraska have succeeded in stifling competition from public utilities. While in 1996 Congress expressly manifested an intent for increased competition, incumbent private providers continue to oppose competition from public utilities with the same arguments heard in the 1930s against public support for rural electrification and in the late 1940s against public support for rural telephone systems. But the competition from public utilities in today's telecommunications market is wholly consistent with congressional intent in the Telecommunications Act and is capable of providing efficient services in a market otherwise dominated by private carriers.

Contrary to what incumbent private providers argue, the state regulatory process is not skewed in favor of public utilities. Congress has acted to restrict or even prohibit any regulatory bias against new private competitors. Moreover, in Nebraska, the legislature has acted to ensure regulatory parity between incumbent and new market entrants, regardless of whether the competitive entrant is a public or private provider. The fact that a majority of states allow public utilities to compete with private businesses in the telecommunications market indicates that most states believe their regulatory processes are not biased.

On the merits, the Eighth Circuit reached the correct result. This Court's precedent supports the Eighth Circuit's construction of the phrase "any entity" in 47 U.S.C. § 253(a). Moreover, the heightened federalism concerns expressed in *Gregory v. Ashcroft* are not present here, where a state is trying to restrict a public utility from competing with its private counterparts, in a marketplace

where Congress has express powers to regulate. In short, the Court should affirm the decision below as fully consistent with Congress' intent in adopting the Telecommunications Act and with this Court's precedents.

ARGUMENT

I. Competition from public entities will further the goals of Congress in enacting the Telecommunications Act of 1996.

No party or *amicus curiae* disputes that the Telecommunications Act represents a sweeping reform designed to bring competitive telecommunications to all areas of the country. Increased competition at the local level was among the primary objectives of the Telecommunications Act. *See* H.R. Conf. Rep. No. 104-458, at 126 (1996) (section 254(a) preempts barriers to both interstate and intrastate services); S. Conf. Rep. No. 104-230, at 147-78 (1996) (discussing expectation that local facilities-based competition would become available in 95% of nation's homes). Congress specifically intended the landmark legislation to promote competition, reduce regulation and encourage the rapid deployment of new telecommunications technologies. Telecommunications Act of 1996, Publ. L. No. 104-104, Preamble, 110 Stat. 56 (1996). Private *amici* Sprint Corporation, United States Telecom Association, *et al.*, however, argue that competition provided by governmental entities like LES is uneconomical and contrary to the congressional goals set forth in the Act.

Amici espouse a "free" market theory by which they would have state governments guard against local competition by restricting those who may actually compete. *See*

Brief of Sprint Corporation at 2; Brief of United States Telecom Association, *et al.*, at 16-17. They essentially argue that the Telecommunications Act's pro-competition goals would be undercut if private industry had to compete with public participants. But contrary to these claims, governmental participation in the market is well known and well accepted in the domestic economy, especially in utilities markets. *See* Richard M. Hodgetts & Terry L. Smart, ECONOMICS 322 (1998) ("ECONOMICS") ("Government-owned utilities such as city gas and electric companies have long been common in this country."); *see also* Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 44 (1999) ("*Municipal Ownership*") ("Federal law broadly permits local governments to provide utilities on a competitive basis."). Municipally-provided telecommunications services serve the pro-competition goals Congress had in the Telecommunications Act.

Questioning the propriety of government involvement in the marketplace is nothing new. Such protests usually claim to be insuring the purity of the competitive market, much like private *amici* claim today. But truly competitive, or "pure" markets, exist only in the abstract. *See* Milton Friedman, CAPITALISM AND FREEDOM 120 (1982) (noting that "there is no such thing as 'pure' competition," rather "competition is an ideal type, like a Euclidean line or point"); *see also* Robert Heilbroner & Lester Thurow, ECONOMICS EXPLAINED 162 (1998) ("ECONOMICS EXPLAINED") (explaining that markets are imperfect for many reasons, including inadequate information, unaccounted-for externalities, or the need to provide "pure" public goods (*e.g.*, military defense)).

Amici's worn arguments played prominently in Depression-era debates surrounding several New Deal programs, including the creation of the Rural Electrification Administration (REA) and Tennessee Valley Authority (TVA). Not only was government participation viewed as an acceptable economic measure, but Franklin Roosevelt was in fact elected President on a platform that encouraged local government participation in the utilities market:

> [W]here a community – a city or county or a district – is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.

The Portland Speech (Sept. 21, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1928-32 (1938). The reasoning then applies equally today:

> It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to hold or operate its own plant. [Rather] I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" [i.e., private utility] gets beyond the point where a mere scolding does no good.

Id.

Congress readily embraced these "corporation[s] with the power of government but possessed of the flexibility

and initiative of a private enterprise," and quickly ushered in the REA and TVA, among others. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. 73-15, at 1 (Apr. 10, 1933). The prominent role these public corporations played in the United States' subsequent economic recovery leaves no doubt as to their competitive efficacy.[3]

Big business was unmoved and later worked to oppose amendments to the Rural Electrification Act that would insert government into rural telecommunications markets. These amendments sought to meet the unserved telecommunications needs of rural America by facilitating the deployment of telecommunications systems in those areas through low-interest government loans. *See Rural Telephones: Hearings on S. 78, S. 121, S. 1254, and H.R. 2960 Before the Committee on Agriculture and Forestry of the United States Senate*, 81st Cong. 1-2 (1949) ("*Senate Hearings*"). The congressional record on these amendments is peppered with economics-based protests, quite similar to those of private *amici* today. *See, e.g., id.* at 242-43 (statement of American Bankers Association) ("We believe that the making of direct loans by Government is not consistent with the American concept of a system of free enterprise."); *Id.* at 306 (statement of H.S. Dumas, President, So. Bell Telephone & Telegraph Co.) ("Surely this Congress can find a better way to meet the objectives which have been outlined by supporters of this bill without passing loosely drawn legislation which will constitute a

[3] Likewise, LES' participation in a joint public-private investment in an interregional transmission line, and in the nation's power grid, *see supra* at 2, belies any concern that public utilities cannot cooperate with investor-owned utilities.

threat of one of the finest industries which has ever been developed in our country."); *Id.* at 315 (statement of V.E. Cooley, President, Southwestern Bell Telephone Co.) (rural telephone service "should be left to the telephone companies for completion, without Federal subsidy and without adding to the taxpayer's burden" and "the present bill is in my opinion unsound and opposed to the public interest"); *Id.* at 331 (statement of V.E. Cooley) ("S. 1254 is unfair to private telephone companies and to the private telephone industry, and we feel that we are going to meet the demands on the rural areas as well as other places.")[4]

But like today, such reverence for supposed "free" market efficiencies was belied by gaps left by private industry in the telecommunications market. *See, e.g., id.* at 6 (statement of Lister Hill, United States Senator for the State of Alabama) ("Despite the many advances in recent years, the farm people of America are still isolated in large measure from each other and from their business and social centers. . . . the modern farmer needs and has a right to reliable telephone service to reach his markets, his suppliers, his doctor, his church, and his neighbors."); *Id.* at 8 (statement of Sen. Hill) ("[T]here is an urgent need for a program of Government Credit in this field."); *Id.* at 159 (statement of J.T. Sanders, Legislative Counsel of the National Grange) (noting that private industry was failing to meet undeniable telephone needs); *Id.* at 160 (statement of J.T. Sanders) ("Rural telephone development has gone

[4] The descendent of one of the former regional Bells, Southwestern Bell Telephone, L.P., is a Petitioner in this case, and another Bell successor is an *amicus*, proving the adage: the more things change, the more they stay the same.

about as far as it can go without new capital"); *Id.* at 161 (statement of J.T. Sanders) ("We believe that [private businesses] have utterly failed to extend adequate services into all areas where sound service can be extended.").

The subsequent passage of these amendments demonstrates that even within our capitalist system there is a role for public participation in the marketplace. Congress' establishment of entities such as the REA and TVA simply confirms the fact that "[e]conomic decisions made through the marketplace are not always better than decisions that governments can make. Much depends on whether those market transactions accurately reflect both the costs and benefits which result. Under some conditions, they do not." Thomas Sowell, BASIC ECONOMICS: A CITIZEN'S GUIDE TO THE ECONOMY 251 (2000) ("BASIC ECONOMICS"). The broad wording in section 253(a) of the Telecommunications Act is consistent with these prevailing views – that local public investment in telecommunications infrastructure may be appropriate and ought not to be prohibited. Congress certainly concluded so in section 253(a).

In short, government participation may not only be appropriate, but sometimes necessary. *See, e.g.*, ECONOMICS, at 322 (noting that the TVA was enacted in response to a serious national problem where "[n]o privately owned business could have completed this vast project and operated it to earn a profit"); *see also* BASIC ECONOMICS, at 253 ("[T]here are things that government can do more efficiently than individuals because external costs or external benefits make individual decisions, based on individual interests, a less effective way of weighing costs and benefits to the whole society."). Inadequate information, purely public goods, and unaccounted-for external

costs and benefits are but a few economic justifications for public entities participating in the market place. ECONOMICS EXPLAINED, at 162. *See also* Peter F. Drucker, POST-CAPITALIST SOCIETY 163 (1993) (noting that "[t]he one effective way to counteract a depression – that is, a prolonged period of structural change – is through investment in the infrastructure," *e.g.*, roads, bridges, harbors, public buildings, public lands); Allen Buchanan, ETHICS, EFFICIENCY, AND THE MARKET 22-25 (1985) ("Government itself may become the provider of a public good which the market fails to provide. . . ."). Indeed, private *amici*'s absolutist opposition to government participation in the market is thus not only unsupportable, but perhaps detrimental to Congress' goal of a robust telecommunications industry. *See* ECONOMICS EXPLAINED, at 163 ("[T]he existence and causes of market malfunction make *some* government intervention inescapable. We can then seek to use government power to repair individual market failures in order to strengthen the operation of the system as a whole.") (emphasis in original).

The rural telephone amendments to the REA illustrate the most fundamental need for government intervention, namely, to fill competitive voids left by private interests that fail to satisfy market demand that must be met. Such intervention can take many forms. In the case of the REA amendments, this meant that government had to facilitate the delivery of telecommunications services to rural America by way of subsidized loan arrangements; in the case of the TVA, active government participation in the utilities market was even more direct. LES' efforts are no different – LES has proposed telecommunications service to fill a need that no private provider has sought to supply. The Gallup Organization's departure from Lincoln makes

clear the continuing need for municipal providers like LES to have an opportunity to fill a public need.

Private *amici*'s opposition to public investment and provision of basic services is unsurprising. *See Municipal Ownership*, at 44 ("Private companies have long protested the effects of government competition. . . ."). As Professor Sowell found:

> Business leaders are not wedded to a free market philosophy or any other philosophy. They promote their own self-interest any way they can, like other special interest groups. Economists and others who are in fact supporters of the free market have known that at least as far back as Adam Smith.

BASIC ECONOMICS, at 330. What private *amici* urge must be viewed skeptically.

Government participation in the telecommunications market is no less appropriate today than it was some three quarters of a century ago. Indeed, in its opinion below, the FCC specifically recognized the ability of municipal utilities to provide competition in rural markets where it might not otherwise exist:

> [W]e reiterate the Commission's urging in the Texas Preemption Order that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring

> the benefits of competition to all Americans, particularly those who live in small or rural communities.

In the Matter of the Missouri Mun. League, et al., CC Docket No. 98-122, Memorandum Opinion and Order, FCC 00-443 ¶ 10 (rel. Jan. 12, 2001) (*"FCC Missouri Mun. League Order"*). Entities like LES clearly further the pro-competition goals of the Telecommunications Act.

Private *amici* also argue that the telecommunications industry is too risky for municipalities. *See* Brief of Sprint Corporation at 22; Brief of United States Telecom Association, *et al.*, at 22-23. They cite some examples of public works projects gone awry or far over initial budgets. *See id.*; Brief of United States Telecom Association, *et al.*, at 22-23. Yet, these examples say nothing about Congress' intent in enacting section 253(a). Cost overruns in public or private investments are not new. Moreover, any mistakes municipalities may have made in investing in telecommunications infrastructure pale to the colossal meltdown in the private telecommunications industry in the late 1990s, when according to Sprint Corporation up to two *trillion* dollars of investor capital evaporated. *See* Brief of Sprint Corporation at 22.

Nor do *amici* properly acknowledge the discipline the electorate imposes on those who spend the public fisc. Indeed, the budgets and spending decisions of a municipality are likely more transparent than the annual reports or SEC filings that private businesses provide their investors. Unwise public investments costing taxpayers can easily lead to repercussions at the ballot box, easily more so than in the corporate boardroom. *See* ECONOMICS EXPLAINED, at 162 ("When private markets don't work, the usual remedy is government. How do we then determine

the level of provision of such publicly provided goods? We eschew the market mechanism and avail ourselves of another means of decision-making: voting.").

II. Congress and individual states like Nebraska have provided a level playing field

A recurring theme private *amici* argue is that municipal utilities do not compete with private telecommunication businesses on a level regulatory playing field. *See* Brief of Sprint Corporation at 17-21; Brief of United States Telecom Association, *et al.*, at 15-24. Municipalities can discriminate in favor of their own entities, these *amici* argue, by granting their municipal entities preferential access to public rights-of-way. In addition, public entities may have condemnation authority, while private entities will not. Public competitors also allegedly benefit from tax subsidies and may be able to misuse confidential business information obtained during the licensing process of private competition.

These arguments inappropriately ignore the safeguards Congress enacted in the Telecommunications Act, as well as the fact that at least in Nebraska, the legislature and the NPSC have ensured a level regulatory playing field. Likewise, states have created a cause of action for misuse of confidential business information, should such a hypothetical risk actually mature into harm. LES' three year, and as yet unsuccessful, experience in trying simply to enter the market and make use of its available telecommunications capacities contradicts any argument that state regulatory agencies cannot be impartial as between private and public providers.

In enacting subsection 253(a) of the Telecommunications Act, Congress specifically preempted all state and local laws that "prohibit or have the effect of prohibiting any entity" from providing telecommunications services. Moreover, subsection 253(c) of that act requires states and municipalities to manage public rights-of-way "on a competitively neutral and nondiscriminatory basis. . . ." These two sections have been construed to prohibit a municipality from imposing a franchise application requirement, fees unrelated to the costs of right-of-way maintenance and even burdensome permit applications. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1177-78 (9th Cir. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1093-1100 (N.D. Cal. 2001). Moreover, standards or requirements that a city might establish do not, *ipso facto*, benefit only a public competitor. They are as likely to benefit the incumbent private provider. *Cf. WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 392 (Minn. Ct. App. 2003) (city required new private operator of open video system to match incumbent cable provider's service area). Congress anticipated either eventuality when it adopted subsections 253(a) and 253(c). If, as private *amici* assert, such barriers exist, section 253 provides them with an appropriate remedy.

Private *amici* also assert that the public regulatory process unduly favors public competitors, so much so that investment in telecommunications services will be discouraged. *See* Brief of Sprint Corporation, at 19-20; Brief of United States Telecom Association, *et al.*, at 21-22. But these unfounded assertions of regulatory bias do not stand up to scrutiny. For example, any private incumbent local exchange carrier who also operates as a competitive local exchange carrier or wireless affiliate will present the same

general regulatory parity concerns for cross-subsidization, accounting requirements or rate regulation. Any regulatory concerns on these issues would be equally applicable to any provider of both cable television and telecommunications services. And in any case, LES has tried for three years to put its existing capacity to use for the benefit of customers in LES' service area, only to be thwarted by the state's regulatory authority. Indeed, LES' situation vividly demonstrates precisely why the preemptive scope of section 253(a) should apply to municipally-owned telecommunications providers.

More importantly, the Nebraska Legislature and the NPSC have already enacted statutes and rules that ensure regulatory parity. For instance, any concern that a political subdivision may discriminate against its privately-owned competitors when granting access to public rights-of-way was fully addressed by sections 86-704(3) and (4) of the Nebraska Telecommunications Regulation Act, which prohibit any such discriminatory conduct:

> (3) Consent from a governing body for the use of a public highway within a municipality shall be based upon a lawful exercise of its statutory and constitutional authority. *Such consent shall not be unreasonably withheld, and a preference or disadvantage shall not be created through the granting or withholding of such consent.* A municipality shall not adopt an ordinance that prohibits or has the effect of prohibiting the ability of a telecommunications company to provide telecommunications service.
>
> (4)(a) A municipality shall not levy a tax, fee, or charge for any right or privilege of engaging in a telecommunications business or for the use by a telecommunications company of a public highway other than:
>
> (i) An occupation tax authorized under section 14-109, 15-202, 15-203, 16-205, or 17-525; and
>
> (ii) A public highway construction permit fee or charge to the extent that the fee or charge applies to all persons seeking use of the public highway in a substantially similar manner. All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in providing services relating to the granting or administration of permits. Any highway construction permit fee or charge shall also be reasonably related in time to the occurrence of such costs.
>
> (b) *Any tax, fee, or charge imposed by a municipality shall be competitively neutral.*

Neb. Rev. Stat. § 86-704(3) and (4) (emphasis added).

Similarly, in Nebraska there is no justifiable concern over how a political subdivision will exercise its power of eminent domain, because every telecommunications carrier in Nebraska possesses the same or similar powers of condemnation. *See generally*, Neb. Rev. Stat. §§ 86-701 to 86-707. Likewise, the Nebraska Telecommunications Universal Service Fund Act (Neb. Rev. Stat. §§ 86-316 to 86-329) and the NPSC's existing regulations relating to universal service set forth in Neb. Admin. Code, tit. 291, ch. 10, already prescribe the obligations of all types of contract carriers, whether private or public. Service quality standards for both private and public contract carriers are covered in Neb. Admin. Code, tit. 291, ch. 5, § 003.18. Moreover, rates for both incumbent and competitive

carriers alike are guided by the same regulatory strictures. *See* Neb. Rev. Stat. § 86-141; Neb. Admin. Code, tit. 291, ch. 5, § 002.31. In short, the experience of Nebraska is that the legislature and the NPSC have ensured that municipal and investor-owned businesses compete on equal terms.

Yet, private *amici* erroneously suggest that a complete prohibition of government entry is the *only* way to ensure a "level playing field." *See* Sprint Corporation Brief at 22-25; United States Telecom Association Brief at 16-17. To support this contention, *amicus* Sprint Corporation alludes to a handful of states that have enacted legislation prohibiting the provision of telecommunications services by governmental entities in violation of 47 U.S.C. § 253(a). *See* Brief of Sprint Corporation at 23 n.19. Of the seven states identified by *amicus* Sprint Corporation, however, only four – Arkansas, Missouri, Nevada and Texas – actually prohibit government entry.[5] Indeed, the vast

[5] Despite *amicus* Sprint Corporation's representations, Tennessee expressly authorizes any municipality operating an electric plant to own *and* operate a telecommunications network. Tenn. Code § 7-52-401. Both private *amici* erroneously cite Tenn. Code § 7-52-601, *et seq.*, which applies to municipal cable operations. In contrast, Tenn. Code § 7-52-401, *et seq.*, applies to municipal telecommunications operations. Likewise, Alabama permits municipalities to provide "advanced telecommunications services." Ala. Code § 11-50B-3. Although Nevada prohibits a municipality with a population of over 25,000 from selling communications services, it nevertheless allows such cities to purchase and construct telecommunications facilities. Nev. Rev. Stat. § 268.086. Moreover, Missouri's restrictive provision set forth at Mo. Stat. § 392.410.7 will expire by operation of law on August 28, 2007. And Nebraska's restrictive statutes (*i.e.*, Neb. Rev. Stat. §§ 86.128(1)(b) and 86.575(2)) were invalidated by the Nebraska Supreme Court. *In re Lincoln Elec. Sys.*, 265 Neb. at 79-80, 655 N.W.2d at 372.

majority of states either expressly or implicitly authorize the provision of telecommunications services by governmental entities.[6] Thus, contrary to private *amici*'s arguments, the majority sentiment expressed by these state legislatures is that competition by governmental entities in the telecommunications marketplace should be encouraged and does not require additional regulatory oversight.

III. The term "any entity" in section 253(a) includes LES and other municipal providers of telecommunications services

The various Petitioners and *amici* urge that 47 U.S.C. § 253(a) improperly alters the constitutional balance between the states and the federal government if it is read to preempt state regulation of telecommunications activities by municipalities. Instead, their argument goes, courts must first apply the "plain statement rule" from

[6] Once again, the reality of private *amici*'s minority position is borne out by the greater number of states that authorize the provision of telecommunications services by a governmental entity. *See, e.g.*, Alaska Stat. § 42.05.990(4); Ariz. Rev. Stat. § 9-511(A); Cal. Const., Art. XI, § 9; Colo. Rev. Stat. § 40-1-103; Del. Code Ann. tit. 26, § 102(2); Ga. Code Ann. § 46-5-162(17); Idaho Code §§ 62-603(14) and 62-610B(5); Ind. Code §§ 8-1-2-1(a) and (h); Ky. Rev. Stat. Ann. § 96.531; Mass. Gen. Laws, ch. 164, § 47E; Mich. Comp. Laws § 484.2102(cc); Miss. Code Ann. § 77-3-1; N.H. Rev. Stat. Ann. § 362:2(I); Okla Stat. tit. 17, § 139.102(27); Or. Rev. Stat. § 759.005(1)(b)(A); 66 Pa. Cons. Stat. § 102; and S.D. Codified Laws §§ 9-41, 49-31-1(28), 49-31-5.1. Indeed, the Minnesota statute cited by private *amici* (*i.e.*, Minn. Stat. § 237.19) merely requires a municipal entity to obtain 65 percent voter approval prior to entering the telecommunications market. This type of requirement is unremarkable and does not equate to a restriction on the provision of telecommunications services. *Cf.* Conn. Gen. Stat. § 7-233ii and N.D. Cent. Code § 40-33.02.

Gregory v. Ashcroft, 501 U.S. 452 (1991), before concluding that section 253(a) does, in fact, preempt such state action. In enacting section 253(a), Petitioners claim that Congress failed to satisfy the *Gregory* decision because Congress did not specifically note that municipalities fall within the broad meaning of "any entity." Because section 253(a) expressly preempts conflicting state law – unless the safe harbors of sections 253(b) or (c) apply – the only dispute that Petitioners present under *Gregory* is whether "any entity" actually means all types of entities, or whether that provision must be read to exclude entities owned by cities or other political subdivisions of a state. By ignoring the fundamental precepts of *Gregory* and its progeny, Petitioners erroneously conclude that the Eighth Circuit decision was inconsistent with this Court's prior preemption decisions.

In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act of 1967 (ADEA) prohibited Missouri from imposing mandatory retirement on state judges based on age. *Id.* at 455. The Court recognized that enforcing the ADEA in favor of Missouri's constitutional officers imposed federal regulation on matters traditionally left to the states, but it did not doubt that the federal government could upset the usual constitutional balance of federal and state powers. *Id.* at 460. The Court reasoned in *Gregory* that a "plain statement rule" was necessary because "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id.* at 461 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)) (other quotation omitted). But *Gregory*

did not establish a talismanic approach, as the Court itself characterized the rule as "nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*

Indeed, the test enunciated in *Gregory* does not fit the circumstances presented here. At issue in *Gregory* was the attempt of the federal government to countermand a compulsory retirement age for state court judges. While Petitioners cast this case as one involving the power of states to regulate what their political subdivisions can do, it does not present the federalism concerns addressed in *Gregory*. There is no dispute here that the Commerce Clause empowers Congress to regulate the telecommunications industry and to preempt conflicting state law under that Clause and the Supremacy Clause. The state laws being preempted are laws that regulate commerce, not the state's power to establish the type of judiciary it has. In other words, Congress should have a freer hand to preempt conflicting state law when Congress is regulating interstate commerce under express authority conferred it in the Commerce Clause.

This conclusion is also consistent with this Court's Commerce Clause market participant precedent. One of the principal purposes of the Commerce Clause was to remove barriers to interstate commerce. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 231 (1824) (J. Johnson, concurring). In determining whether state practices that restrict interstate commerce passed constitutional muster, the Court has distinguished between states as regulators and states as market participants. As explained in *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 (1980), state regulations that inhibit interstate commerce are open to being struck

down, while state regulations that increase competition or result in direct state participation in commerce will be protected. In LES' case, the legislature tried to regulate interstate commerce by eliminating the participation in the market by its political subdivisions. This effort to ban interstate commerce is inconsistent with this Court's market participation precedents and not part of the federal balance the Court tried to protect in *Gregory*.

Petitioner Southwestern Bell argues that unless the FCC's position is sustained, states will be able to abolish a political subdivision, but if a state maintains a political subdivision, the state will be unable to prevent the subdivision from offering telecommunications services. *See* Brief of Southwestern Bell at 11. There is nothing illogical with that result. Congress can regulate how states participate in the telecommunications market without prescribing how the state organizes itself into political subdivisions. It is fully consistent with the Commerce Clause that a state can elect to create or eliminate a particular subdivision, but if the state maintains a particular subdivision, and if interstate commerce is involved, as here, Congress can regulate the state and its subdivision under the Commerce Clause.

The limited nature of the state interest here is also reflected in the FCC's decisions involving section 253(a). In the FCC decision that the Eighth Circuit reversed, the FCC addressed a circumstance like that of LES, where a division of a municipality was attempting to offer telecommunications services. *FCC Missouri Mun. League Order,* at ¶¶ 1-2. The FCC, however, had previously observed that the phrase "any entity" could encompass a municipally-owned corporation. *Id.* at ¶¶ 9, 20. The FCC thus agrees that if a municipality created a non-profit

corporation to offer telecommunications services, that corporation would be within the phrase "any entity" found in section 253(a).[7] This is not to say that municipalities must be permitted to set up their own corporations, as they may be prohibited from doing so by other, unrelated provisions of state law. But the federal balance *Gregory* sought to maintain is unaffected if the preemptive effect of section 253(a) simply turns on the organizational format the municipality uses to offer telecommunications services.

The Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) also supports the decision below. In *Salinas*, the Court addressed whether a federal bribery statute that by its terms applied to "any business transaction," actually applied only to bribes affecting federal funds. The Court rejected the defendant's attempt to narrow the obviously broad scope of the law, finding that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." *Id.* at 57 (citations omitted). The Court held that the proper inquiry is simply whether it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Id.* at 60 (quotation omitted).

Applying this standard to the federal statute before it, the Court in *Salinas* concluded that "[t]he text of [the bribery statute] is unambiguous on the point under construction here" and thus "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure

[7] The FCC's narrow distinction at least explains why it does not argue a *Chevron* deference standard in its brief to support its construction of section 253(a).

from the statute's terms." *Id.* As *Salinas* illustrates, this Court has found that the use of "any" as a modifier is sufficiently clear to satisfy the *Gregory* plain statement rule. *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'")

The Eighth Circuit's decision is perfectly consistent with *Gregory* and *Salinas*. No part of section 253(a) remotely resembles the ADEA provision addressed in *Gregory*. Section 253(a) makes no exceptions and creates no confusion as to its reach: "*No State or local statute or regulation*, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a) (emphasis added). An objective reading of this provision leaves no question that Congress intended to preempt *all* state regulation of entry into the telecommunications service industry by *any* entity. A narrower reading, such as that suggested by Petitioners, is contrary to the expansive language Congress used and would "press statutory construction to the point of disingenuous evasion [of] a constitutional question." *Salinas*, 522 U.S. at 60 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)). The statute's plain text leaves no doubt that Congress intended to insert the federal power into this traditional state concern and, thus, the Eighth Circuit properly applied this Court's *Gregory* principle.

The Eighth Circuit's approach in addressing the preemptive scope of section 253(a) undercuts any claims of the Petitioners that the Tenth Amendment or federalism concerns are in any way implicated. The Eighth Circuit

recognized that for purposes of interpreting section 253(a), it did not matter whether the entity included within the protective language ultimately had the power or authority to provide telecommunications services under state law. Before engaging in the application of the "plain statement rule," the Eighth Circuit noted:

> It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Missouri Municipal League v. Federal Communications Comm'n, 299 F.3d 949, 953 (8th Cir. 2002).

The federal question remains whether "any entity" – whether public or private – is entitled to the protections of the Telecommunications Act and secure from prohibitory statutes enacted by state legislatures to prohibit entry into the field of telecommunications. Municipalities and their utility departments are certainly *entities* for purposes of section 253(a). Answering that question in no way answers, or needs to answer, the question of whether the protected entity possesses the inherent or conferred authority to provide telecommunications services in the first instance. Thus, it is unnecessary for this Court to delve into issues of sovereignty, federalism or Tenth Amendment rights. Section 253(a) does not mandate that all political subdivisions be authorized to enter the telecommunications field. Rather, it simply protects those entities that may have the authority, based on home rule

power or constitutional or statutory authorization, from prohibitory legislation precluding their entry.

The *Salinas* decision likewise confirms the Eighth Circuit's proper adherence to this Court's precedent. As in *Salinas*, the Eighth Circuit faced a federal statute in which Congress clearly sought the broadest reach possible by employing the modifier "any" before the word "entity." Petitioners attempt to obscure this clarity by arguing that Congress *could have* intended to exclude municipalities from the meaning of "any entity." But as illustrated in *Salinas*, the approach to statutory interpretation used in *Gregory* is not a license to create an ambiguity simply by raising *possible* varying interpretations of an Act. *Salinas*, 522 U.S. at 60 ("[A statute] need only be plain *to anyone* reading the Act that the statute encompasses the conduct at issue.") (quotation omitted). *See also Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that the Court historically applied the plain statement rule only to "whether Congress intended a particular statute to extend to the states *at all*") (emphasis in original). Thus, in *Salinas* the Court found no ambiguity in Congress' command when it used the term "any" and, accordingly, concluded that the bribery statute did not offend the *Gregory* principle. It follows that the Eighth Circuit properly found that the plain statement rule does not preclude Congress' clear intent to preempt state regulation in this area of traditional state governance.

The Court's decision in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), cited by Petitioners, is inapposite. *Raygor* concerned whether 28 U.S.C. § 1367(d) tolled the statute of limitations for claims against non-consenting states that are subsequently dismissed on

Eleventh Amendment grounds. *Id.* at 542. Section 1367(d) purported to apply to "any claim," but the Court expressed reservations over reading the statute with such an expansive scope in the absence of clearer congressional intent that it apply to states. *Id.* at 542-44. The Court ultimately found that Congress had not sufficiently expressed its clear intent to have section 1367 apply to the states for purposes of abrogating their Eleventh Amendment immunity. *Id.* at 544-46. *Raygor* is inapposite because there is no question that Congress intended that section 253 apply to the states – the statute in fact *limits* its reach to the states and local government. 47 U.S.C. § 253(a). Thus, the concerns in *Raygor* that Congress did not sufficiently express its intent to have the statute apply to the states is not be present here.

CONCLUSION

In 1996, Congress acted to open up the local telecommunications market to competition. Consistent with that goal, the Eighth Circuit properly interpreted the phrase "any entity" in section 253(a) to include municipal utilities such as LES. Accordingly, LES urges the Court to affirm the Eighth Circuit, which will allow LES to proceed further with its efforts to fulfill Congress' objective of enhanced competition through the Telecommunications Act.

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Attorney General of Missouri,

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Respondents.

FEDERAL COMMUNICATIONS COMMISSION
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SOUTHWESTERN BELL TELEPHONE, L.P.,
fka Southwestern Bell Telephone Company,

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF EDUCAUSE IN SUPPORT OF RESPONDENTS

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EDUCAUSE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

EDUCAUSE, an international association representing the information technology interests of nearly 1,900 colleges, universities and education organizations, respectfully submits this Brief *Amicus Curiae* in support of Respondents. EDUCAUSE urges affirmation of the Eighth Circuit's decision.

INTEREST OF EDUCAUSE AS *AMICUS CURIAE*

The mission of EDUCAUSE is to advance higher education by promoting the intelligent use of information technology. EDUCAUSE is an international nonprofit association, with membership open to colleges and universities, corporations serving the higher education information technology market, and other related associations and organizations. Current membership includes nearly 1,900 colleges, universities, and education organizations, and more than 180 corporations.

The Internet was largely developed by higher education researchers, for higher education researchers. To this day, the higher education community has retained its role as a proving ground for the deployment of leading-edge, high-bandwidth networks, enabling both academic research and

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

e-learning. Campus administrators must wrestle with the voracious, ever-increasing demand for bandwidth of today's student and faculty population (both on- and off-campus).

EDUCAUSE's interest in the current proceeding lies in the fact that colleges and their surrounding communities – many of which are quite remote – have a vested and mutual interest in the economic acquisition of high-bandwidth network services. As discussed below, municipal participation in the telecommunications market holds great potential for not only meeting the needs of the higher education community, but for speeding the deployment of advanced networking services to the broader American population.

SUMMARY OF THE ARGUMENT

At issue in this case is whether the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, includes municipalities in the term 'any' in Section 253(a) which states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Restricting the term "any entity," contrary to Congressional intent, will in effect prevent municipal broadband development initiatives, such as fiber-to-the-home, that would otherwise provide advanced communications capabilities at affordable prices to higher education institutions *and* the communities they serve.

The overriding purpose of the Telecommunications Act of 1996 is to speed the deployment of advanced

telecommunications capability to all Americans. We believe Congress' laudable objective can in some circumstances be met by municipal provision of telecommunications services, and therefore that § 253(a)'s expansive language should be interpreted to include municipalities. In the specific context of the relationship between municipal networks and the higher education community, we believe the goals of the Telecommunications Act, and the needs of higher education, are supported by such an interpretation for these reasons:

1. Partnerships between higher education and local governments are creating opportunities for communities to obtain advanced telecommunications services.

2. Local government networks can help colleges and universities meet their technical requirements and financial constraints as consumers of telecommunications services.

ARGUMENT

1. Partnerships between higher education and local governments are creating opportunities for communities to obtain advanced telecommunications services.

The cooperative efforts of higher education institutions and local governments to plan, build, finance, and deploy advanced telecommunications networks are one way that the Telecommunications Act's key objective – bringing advanced telecommunications services to all areas – is being met. Especially where private companies have failed to meet local needs, local governments and higher education working together have pioneered efforts to solve the economic development and advanced networking

needs of underserved localities, creating significant competitive advantages for communities that may otherwise lag behind on the technology adoption curve.

One example is the "eCorridors" project,[2] a collaboration between Virginia Polytechnic Institute and State University (Virginia Tech) and interested communities in rural Virginia. Focused on a long-term vision of facilitating the development of next generation network infrastructure and services, the eCorridor project seeks to link the predominantly rural areas along U.S. Route 58 in Virginia with the high-tech and advanced network services found in the more developed, urban portions of the state. The "eCorridors" of Virginia Tech's program are electronic Internet routes that, when fully completed, will resemble a grid, or mesh, of network connectivity into and out of every community throughout the Commonwealth of Virginia. The eCorridors project is specifically designed to enable these generally-small communities to leapfrog existing network technologies, and to provide access to advanced networks that promise to greatly increase economic development and education opportunities for citizens of towns that might otherwise be left behind.

Virginia Tech's work on how to transfer advanced network technology for economic development is one of many such projects with similar goals. Carnegie Mellon University's Center for Appalachian Network Access has helped set up a wireless broadband network in Glenville, West Virginia (pop. 2,000), and plans another in rural

[2] *See generally* http://www.ecorridors.vt.edu.

western Pennsylvania.[3] Similarly, in the rural Southwest, Texas Tech has contracted to provide wireless Internet access in a network extending from Texas into New Mexico.[4] The University of California, San Diego's HPWREN project "is working toward delivering high-speed Internet connectivity to several remote communities in east San Diego."[5]

A second way that localities and institutions of higher learning work together to further the goals of the Telecommunications Act is by pooling their resources for joint network projects, serving both the institutions and their surrounding areas. Acting in partnership with regional and municipal non-profit and governmental entities, higher education institutions can serve as "anchor tenants" and co-investors for local and regional network development. One example of a university acting as anchor for a locality's network is the relationship between OneCleveland and Case Western Reserve University.[6] The City of Cleveland, Cleveland State University, the Regional Transit Authority and the Cleveland Municipal School District are among the partners of this initiative,

[3] Associated Press, *Researchers Work to Improve Internet Access in Rural Towns*, reprinted in USA Today, Sept. 12, 2003, *at* http://www.usatoday.com/tech/news/techpolicy/2003-09-12-digital-divide_x.htm.

[4] Press Release, Texas Tech University, Texas Tech University Signs Agreement to Build Network to Improve Internet Access to Rural Areas (July 2, 2003), *at* http://www.wcai.com/pdf/2003/p_amaJuly2.pdf.

[5] *High Performance Wireless Research and Education Network*, *at* http://hpwren.ucsd.edu/education.html (last visited Oct. 21, 2003).

[6] *See* Business Wire, *Case Western Reserve University Adds Six Major Organizations to OneCleveland Network*, Sept. 17, 2003, *at* http://www.cwru.edu/its/strategic/News%20Page.htm.

connecting to Case Western's network and providing unprecedented connectivity speed (more that 1,400 times faster than most broadband connections) that will enable Cleveland's citizens to take advantage of education, health and other advanced applications that require robust bandwidth. As new "entities" like OneCleveland demonstrate, accomplishing the goals of Congress for new services and competition in telecommunications require more than reliance on the traditional shareholder-owner companies.

Similarly, the University of Florida is an anchor tenant of the Gainesville Regional Utilities Network, GRU.net.[7] In Provo, Utah, Brigham Young University is the major customer of Provo City Power, which operates the iProvo municipal fiber-to-the-home network.[8] The University of Georgia joined with county government and local businesses to launch a wireless network in downtown Athens, Georgia.[9] WinstonNet, which grew out of a Wake Forest University networking project, is comprised of a fiber-optic ring that surrounds the city center and provides free high-speed Internet access in recreation centers,

[7] *See* Gainesville Regional Utilities, 2002 Annual Report 22 (2002) *at* http://www.gru.com/Pdf/AnnualReport2002/AnnualReportFULL_2002.pdf.

[8] *See generally iProvo: History of the Project*, *at* http://www.iprovo.net/history.php (last visited Oct. 22, 2003).

[9] Sandeep Junnarkar, *Growth: Cities try to cash in*, CNET news.com, Feb. 3, 2003, *at* http://news.com.com/2009-1033-982322.html?tag=cd_mh; *The WAGz Story: How the Wireless Athens Georgia Zone came to be*, *at* http://www.nmi.uga.edu/research/wagzstory.asp (last visited Oct. 21, 2003).

libraries, schools and a homeless shelter, as well as area businesses.[10]

2. Local government networks can help colleges and universities meet their technical requirements and financial constraints as consumers of telecommunications services.

Institutions of higher learning create huge demand for bandwidth. Many colleges and universities are also looking for ways to cut costs. In some places, local government networks are helping the college communities achieve both these goals, providing the symmetrical, fiber-optic connections that modern applications require, while accommodating the financial limitations of public and private colleges and schools.

The preeminent stature of the United States in fundamental areas of research and innovation is challenged by increased global competition. The incessant, dizzying, upward spiral of computational and data transmission requirements is driving the need to find new ways for improving network capability faster and providing it at lower cost. Increasingly, scientists rely on distributed processing power and storage facilities, multiple computers tied together using optical communications "grids" to create

[10] Barnaby J. Feder, *Information On-Ramp Crosses a Digital Divide*, Tuscaloosa News, July 8, 2003, http://www.tuscaloosanews.com/apps/pbcs.dll/artikkel?SearchID=73151013489539&Avis=TL&Dato=20030708&Kategori=ZNYT05&Lopenr=307080362&Ref=AR.

flexible, scalable, powerful, low cost computational infrastructure.[11] Today, access to this new optical infrastructure is a key advantage for a relatively few research institutions. Soon, such access will be fundamental to competitiveness and relevance in all areas of scientific research including biotechnology, atmospheric research, nanotechnology, oceanography, space, and defense.[12]

In rural areas in particular, and other places where the private sector is unlikely to provide advanced services in the near future, scientific researchers must have access to advanced network capability if they hope to conduct research at a pace and of a level comparable to their colleagues in urban environments. In addition, researchers and students who wish to access the institution's resources from their homes must have a robust broadband connection. The National Science Foundation recently awarded the Pittsburgh Supercomputing Center and seven other academic institutions funding to wire 100 households with 100 megabit per second (Mbps) Internet connections, with

[11] As an example of this kind of computing, Virginia Tech recently announced that it would be building a Supercomputer by connecting 1,100 Apple computers. *See Detailed Notes from the Virginia Tech Supercomputer Presentation* (Sept. 5, 2003), *at* http://www.chaosmint.com/mac/vt-supercomputer.

[12] Applications driving such requirements range from high-energy physics to the development of new exotic materials to climate simulation to bioinformatics to a whole host of monitoring, sensing, search, and retrieval applications critical to our nation's security. Any research institution in the U.S. without access to national optical research network infrastructure, including high capacity local and intrastate infrastructure, will be severely disadvantaged for attracting research in any area related to or dependent upon computation, visualization, or digital collaboration.

the ultimate goal of upgrading millions of households within the next few years.[13] These connections will provide much-needed high-speed access to centralized scientific resources, such as digital libraries and the Visible Human database.

The high cost of telecommunications to be born by higher education and other consumers is often a function of their remoteness. The existing national fiber optic network infrastructure is comprised of relatively few nodes located primarily in major, "tier one" cities interconnected by high capacity, long haul fiber optic cables. This inter-city fiber passes through a relatively small proportion of the geographic area of the country. Access to the network is limited, even within the communities through which it passes. Much like the air travel system, this national infrastructure can be accessed only at the major nodes it interconnects.

Fundamental shifts in the information technology industry (increased competition, lower margins for traditional services, and ever-increasing technology change) have caused the traditional providers to increase their focus on shorter term, high-margin opportunities. The combination of varied and complex demands and tight budgets, however, make dealing with the higher education community expensive and inconvenient for vendors. As a result, with the exception of typical consumer-related services such as cable and telephone service for students

[13] Pittsburgh Supercomputer Center, *NSF Awards $45 Million to Pittsburgh Supercomputer Center for 'Terascale' Computing* (Aug. 3, 2000), *at* http://www.psc.edu/publicinfo/news/2000/terascale-08-03-00.html.

in dormitories and apartment buildings, the major broadband providers have little interest in serving the higher education market. By contrast, the public service mission of municipal entities has led them to provide telecommunications services for education purposes at affordable prices.

Higher education's focus on research and development lies at the heart of the problem of cost. Higher education requires leading-edge telecommunications services, but almost invariably lacks the means to pay market prices to private providers for the those services. Public higher education institutions' sales cycles can be significantly longer than in the private sector, creating a disincentive for sales teams that are typically motivated by measurement systems and compensation plans targeted to short term sales goals. Higher education transactions typically contain unique requirements that may or may not be available in legacy systems or in the skill sets of large, established telecommunications industry personnel.

A significant opportunity to alleviate this problem lies in higher education institutions' potential ability to work closely with a local governmental entity that shares a public service interest in meeting both the community's education and its economic development goals. New entrants into various branches of the telecommunications industry will be more likely if municipalities and early adopters (such as colleges and universities) are allowed to bear the sunk costs associated with the initial provision of advanced network facilities. New telecom entrants could (for an appropriate charge) simply offer services over the municipally-owned infrastructure, much like new airlines contract for terminal space at the municipal airport.

There is no uniform pattern as to how municipalities fund, own and manage their communications networks, or whether their focus is on the home or business. Municipalities that choose to do so often enter into partnerships with private telecommunication providers, which build the network in exchange for the municipality facilitating access to the customer base. Differing approaches aside, many of these initiatives spring up from the same goals: providing a choice in telecommunication services for their citizens, and encouraging business development in their regions.

Where the private sector may determine that costs are too high and return on investment is too low, a municipal government may invest in infrastructure at cost-of-service rates for public service and education goals because they know that such investments are critical to future competitiveness and economic well-being. One example is the Hometown Utilicom project[14] in Kutztown, Pennsylvania, the home of the Kutztown University of Pennsylvania (with an enrollment of 7,000 full-time students). The Borough of Kutztown (pop. 4,500) elected to deploy an all-optical network to provide homes, businesses, and off-campus university housing with state-of-the-art voice, video and data services. This community-owned fiber-optic network has the capacity to deliver high-speed data service up to 100 Mbps to the end user, helping attract new businesses to the area while offering customers a competitive choice for services, and at the same time

[14] *See generally* http://www.hometownutilicom.org/.

provides an alternative revenue source that can be reinvested into Kutztown.

In Denver, the Denver Institutional Area Network Environment (DIANE) consists of 700 miles of fiber optic cable connecting nearly 100 municipal locations and the area higher education community, including the Denver Community College, Metropolitan State and University of Colorado at Denver. DIANE's location near a national exchange point known as the Front Range Gigapop (located on the University of Colorado at Denver campus) enables the city to connect to the State of Colorado's Higher Education Internet Service Access Cooperative and the state's Multi-Use Network for Telecommunications, "increasing the city's access bandwidth capability into the global Internet at substantially reduced costs."[15]

In Muskegon County, Michigan, as part of the Link-Michigan project, the County is in the process of expanding its fiber optic infrastructure to connect more than 80 county buildings, including area schools and colleges. "The savings, which will be seen from aggregation of services, will pay for a substantial portion of the fiber infrastructure. [The network] also provides a platform to pursue new connectivity services, facilitate on-line learning and encourage collaboration among other public institutions."[16] In Eugene, Oregon, the Eugene Water and Electric Board (EWEB) joined with other area public entities in 2001 to

[15] Dean Smits & Chip White, *The City of Denver Deploys its Broadband Network*, NATOA J. of Mun. Telecomm. Pol'y, Fall, 2003, at 9.

[16] *Id.*, at 32.

form a Public Agency Network (PAN), with EWEB serving as executive authority.[17] The University of Oregon, Lane Community College, and area school districts share an infrastructure consisting of a 70-mile fiber optic ring serving EWEB's utility, as well as local government and education needs.[18]

Local and regional network projects benefit colleges and universities as consumers of telecommunications. The availability of advanced telecommunications is essential for all colleges and universities. Because public networks are, in some places, the only option available to meet the needs of institutions of higher learning, recognition of local governments as "entities" that can provide telecommunications furthers the goals of the Telecommunications Act.

CONCLUSION

EDUCAUSE asks this Court to affirm the decision of the court of appeals.

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[17] *See* Joyce Winslow, *Local Fiber Initiatives: What's in Store for the Metro Area?*, *at* http://cc.uoregon.edu/cnews/summer2001/fiber.html (last visited Oct. 22, 2003).

[18] *See id.*

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ARGUMENT 2

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2. Consistent with the overall goals of the 1996 Telecommunications Act, Congress clearly intended to include municipalities as "entities" protected by section 253(a) of the Act. 6

3. Rural Southwest Virginia provides one example of an area where service from both municipal and private entities is necessary to achieve the economic development goals of the Telecommunications Act. 10

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INTEREST OF CONGRESSMAN BOUCHER AS *AMICUS CURIAE*[1]

Congressman Rick Boucher represents the Ninth District of Virginia, in the mostly rural, southwestern area of the state. A focus of his career in the House of Representatives has been promoting the economic development of the District. The decline of the region's tobacco industry and some other industries have created the challenge of finding new opportunities for jobs and growth. Congressman Boucher identified telecommunications as part of the solution for the economic challenges facing Southwest Virginia, and since the 1990s, he has been one of the leaders in the effort by the Congress to reform the law of telecommunications. In particular, he has promoted local government telecommunications projects, since the Blacksburg (Virginia) Electronic Village kicked off in 1993, up through and including the Bristol Virginia Utilities' Optinet offerings, some of which began in 2003. Because Congressman Boucher has insight into how the 1996 Telecommunications Act came about, and what the 1996 Act was supposed to accomplish for areas like his district in Southwest Virginia, where some local governments are providing telecommunications services, his views will be of assistance in its consideration of the issue of whether Congress intended in the 1996 Act to preempt state laws

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, and the Virginia Towns of Abingdon, Front Royal, and Richlands, the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the members of Virginia Municipal Electric Association No. 1, made a monetary contribution to the preparation and submission of this brief.

that would be barriers to the entry of local governments into the market for providing telecommunications services.

SUMMARY OF ARGUMENT

State laws prohibiting local governments from providing telecommunications services are invalid. In the 1996 Telecommunications Act, the Congress provided that the states may not prohibit "any entity" from providing telecommunications services. The words "any entity" should be given their ordinary meaning, which certainly includes a governmental entity. Congress chose not to make the same distinction in section 253(a) between public and private entities that was made in the pole attachment section of Act, 47 U.S.C. § 224, a part of the Act on which Congressman Boucher focused specifically. The Federal Communication Commission's contrary interpretation is inconsistent with the plain meaning of the statutory language, the intent of Congress, and the policy goals of the Act. This Court should honor the intent of Congress and allow local governments to offer commercial telecommunications services, notwithstanding any barriers to market entry enacted by the States.

ARGUMENT

1. The 1996 Telecommunications Act was the product of years of work by Congressman Boucher and other Members of Congress to increase the availability of telecommunications services and competition among telecommunications providers.

The 1996 Telecommunications Act was the end result of years of Congressional attention to the problem of

competition in the telecommunications industry. In 1989, Congressman Boucher, along with Senator Albert Gore of Tennessee, introduced legislation to permit telephone companies to offer cable television service within their telephone services areas. 135 Cong. Rec. E1814 (May 22, 1989). In 1991, Congressman Boucher and others introduced the Communications Competitiveness and Infrastructure Modernization Act of 1991. 137 Cong. Rec. E2064 (June 6, 1991). In 1993, Congressman Boucher sponsored H.R. 1312, the Local Exchange Infrastructure Modernization Act; H.R. 1504, the Communications Competitiveness and Infrastructure Modernization Act of 1993; and H.R. 1757, the High Performance Computing and High Speed Networking Act of 1993. *See* 139 Cong. Rec. E617 (Mar. 11, 1993); 139 Cong. Rec. E799 (Mar. 29, 1993), 139 Cong. Rec. E988 (Apr. 21, 1993).[2]

In years preceding enactment of the 1996 Act during the 104th Congress, Congressman Boucher served (and continues to serve) on the Telecommunications, Trade, and Consumer Protection Subcommittee of the House of Representatives' Committee on Commerce,[3] and the Courts and Intellectual Property Subcommittee of the House of Representatives' Committee on the Judiciary. In addition, through the 103rd Congress, Congressman Boucher served as Chairman of the Science Subcommittee of the House Committee on Science, Space and Technology.

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[2] *See* generally http://www.house.gov/boucher/docs/boucherinfotech.htm.

[3] This subcommittee is now the Subcommittee on Telecommunications and the Internet.

All of these committees shaped what ultimately became the 1996 Telecommunications Act.

The goals of the earlier legislation, like the goals of the 1996 Telecommunications Act, were to introduce the benefits of competition to all consumers of telecommunications services, to provide incentives for all kinds of providers of telecommunications services to install modern networks, and to make advanced services available in all areas of the country. The need to ensure that the benefits of advanced telecommunications capabilities were made available in rural areas was an overriding objective of Congressman Boucher, as is evidenced by his remarks in the Congressional Record discussing the importance of advanced telecommunications capabilities for economic development in small towns and rural communities. 140 Cong. Rec. E753 (Apr. 21, 1994) (comments in anticipation of H.R. 3636). As Congressman Boucher stated on the floor of the House in commenting on the conference report, the 1996 Telecommunications Act largely realized the goals of his earlier legislative efforts to bring the benefits of competition and modernization to the nation's telecommunications industry. 142 Cong. Rec. H1159 (Feb. 1, 1996) (remarks of Congressman Boucher). The passage of the 1996 Telecommunications Act was, in a very real sense, the culmination of nearly 10 years' work by Congressman Boucher and others.

In the 103rd Congress, on June 28, 1994, the House passed H.R. 3636, which was called the Communications Competition and Information Infrastructure Act of 1994. In the Senate, S. 1822, called the Communications Act of 1994, was reported out of committee but was not taken up by the full Senate prior to adjournment. As its sponsor, Senator Hollings stated, "Though that bill [S. 1822] was reported by the Commerce Committee by a vote of 18 to 2,

there was not enough time in the 103rd Congress to complete our work." 142 Cong. Rec. S687 (Feb. 1, 1996) (remarks of Senator Hollings); *see* S. Rep. No. 23, 10 (1995). The work on reforming telecommunications law resumed in the next Congress.

In the 104th Congress, on March 30, 1995, Senators Pressler and Hollings decided to "pick up where we left off in the last Congress" and introduced S. 652, which ultimately became Pub. L. No. 104-104, the Telecommunications Act of 1996. *See* 142 Cong. Rec. S687 (Feb. 1, 1996) (remarks of Senator Hollings). In the House, Congressman Boucher co-sponsored H.R. 1555. The Senate bill passed in June; the House billed passed in August. The House passed an amended version of S. 652, substituting the language of H.R. 1555, and requested a conference to resolve the differences between two versions of the bill. Congressman Boucher was selected to serve on the Conference Committee which agreed upon the final language of the 1996 Telecommunications Act. *See* 141 Cong. Rec. H10002 (Oct. 12, 1995) (listing House appointees to conference committee).

The final bill addressed a substantial number of issues on which Congressman Boucher with other congressmen had worked specifically. In particular, Congressman Boucher took a lead role in crafting portions of the law dealing with electric utilities. Along with Congressman Gillmor, Congressman Boucher introduced a bill that would allow utilities subject to the Public Utility Holding Company of 1935, 49 Stat. 803, 15 U.S.C. § 79a *et seq.* ("PUHCA") to provide telecommunications services. *See* 141 Cong. Rec. H4522 (May 3, 1995) (remarks of Congressman Gillmor). Congress ultimately approved such a provision as part of the 1996 Telecommunications

Act. Along with Congressman Markey and others, Congressman Boucher worked on refining the pole attachment provisions of earlier versions of the Act. *See* 140 Cong. Rec. H5236 (June 28, 1994) (remarks of Congressmen Markey and Boucher). Significantly, in revising the pole attachment provisions, Congressman Boucher purposefully retained language that excluded municipal utilities from the scope of the definition of "utilities" for purposes of pole attachments while not making such a limitation in the term "any entity" in 47 U.S.C. § 253(a).

For his work on telecommunications law, Network Computing magazine honored Congressman Boucher as one of the "Ten Most Important People of the Decade" of the 1990s, recognizing him as "one of the leading architects of the Telecommunications Act of 1996." Peter Morrissey, *Number 9: Rick Boucher*, Network Computing (Oct. 2, 2000).[4]

2. Consistent with the overall goals of the 1996 Telecommunications Act, Congress clearly intended to include municipalities as "entities" protected by section 253(a) of the Act.

Section 253(a) derives directly from earlier sessions of Congress. It was included (as new section 254) in both the House and the Senate versions of S. 652, and made new section 253(a) by the Conference Committee on S. 652. *See* H.R. Rep. No. 458, at 126-27 (1996). Section 253(a) carries over language from what was called new section 230(a), in

[4] Online at http://www.networkcomputing.com/1119/1119f1people_9.html.

§ 302 of S. 1822 from the 103rd Congress. Witnesses testifying at Senate hearings in support of S. 1822 expressed their understanding that its language would prohibit barriers to entry affecting electric utilities. *See* Testimony of Richard Green, Senate Committee on Commerce, 1994 WL 233334 (May 18, 1994) ("S. 1822 clearly recognizes that utilities can be telecommunications providers generally"); Testimony of William Ray, Senate Committee on Commerce, 1994 WL 232976 (May 11, 1994) ("Section 302 recognizes the right of electric and other utilities to provide telecommunications services"); Testimony of Lawrence Gressette, Senate Committee on Commerce, 1994 WL 232980 (May 11, 1994) ("We are particularly pleased that S. 1822 explicitly recognizes the importance of participation by electric utilities in the provision of telecommunications services and removes regulatory barriers to such participation"). In reporting S. 1822 to the full Senate, the Commerce Committee explained that section 302 of S. 1822, adding new section 230(a), "allows all electric, gas, water, steam, and other utilities to provide telecommunications." S. Rep. No. 367, at 22 (1994).

In earlier House versions of the Act, the preemption language provided that "no State or local government may . . . effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service, or impose any restriction or condition on entry into the business of providing any such service." Title I, section 102(a), H.R. 3636, 103d Cong., 140 Cong. Rec. H5217 (June 28, 1994). Even before the conference on S. 652, the House followed the Senate and replaced "any person or carrier" with "any entity" in passing its version of S. 652. The language of the prohibition against barriers

to entry was simplified and broadened into what is now section 253(a).

The language of section 253(a) is deliberately broad. In shaping section 253, Congress balanced the regulatory interests of state and local government against the federal policy against barriers to entry. *See* 141 Cong. Rec. S8174-S8176 (June 12, 1995) (remarks of Senator Hollings); 140 Cong. Rec. H5228 (June 28, 1994) (remarks of Rep. Markey, in joint explanation of H.R. 3636) (describing the "overarching goal of enabling States to impose necessary and appropriate terms and conditions so long as they do not amount to an effective prohibition on entry into the telecommunications business"). Sections 253(b) and (c) represent the limit of the willingness of Congress to allow the states to regulate the market for telecommunications services. *Id.* No other exceptions to the broad language of section 253(a) were allowed.

In passing the 1996 Telecommunications Act, Congress understood that electric and other utilities would be allowed to provide telecommunications services under the Act. Congress adopted the Senate version of S. 652 on the issue of amending the PUHCA. The Senate's version paralleled H.R. 912, which Congressman Boucher had co-sponsored earlier in the House. The rationale Congress applied when it chose to include utilities covered by the PUHCA as providers of telecommunications services extends to all electric utilities.

Congress recognized that "electric utilities in general have extensive experience in providing telecommunications," that advanced telecommunications services can save energy and money for customers of electric utilities, and that electric utilities have enough customers to be

"effective competitors" in the market for telecommunications services. *See* S. Rep. No. 23, at 6-7 (1995). Similarly, Congress recognized that electric utilities and other utilities might "choose to provide telecommunications services" and section 253(b) would allow states to protect consumers of those utilities. *See* H.R. Rep. No. 458, at 127 (1996). As the legislative history indicates, Congress fully expected that electric utilities would serve as providers of telecommunications services, without distinguishing between investor-owned and municipal utilities.

Congress used the term "utilities" to include municipal utilities except where it specified otherwise. Where Congress intended to make a distinction between municipal and investor-owned utilities, it has said so in unambiguous terms. Section 703 of the 1996 Telecommunications Act revised the pole attachment provisions while retaining the distinction for purposes of section 224 between municipal and investor-owned utilities. *See* 47 U.S.C. § 224(a)(1). Like other parts of the Act, the pole attachment provisions were considered in detail over the course of several sessions of Congress. The difference between these provisions and section 253(a) highlights the intention of Congress to include both public and private entities within the scope of section 253(a).

Congress recognized the economic reality that profit-seeking companies in the private sector would seek first to serve areas with greater population density and wealth. Accordingly, Congress imposed requirements in the 1996 Telecommunications Act designed to provide additional incentives for private businesses to serve rural areas. At the same time, Congress had no intention of eliminating any potential source for the provision of telecommunications services in historically underserved areas.

Congress believed that the public would best be served if all kinds of entities were allowed to provide telecommunications services. Congress sought to enable utilities, both public and private, to become providers of telecommunications services. The amendment to the PUHCA to allow public utilities to provide telecommunications services was just one part of this program. By prohibiting all state law barriers to entry, Congress sought deliberately to open the marketplace to private and public providers of telecommunications, to maximize the potential for service in all areas.

3. Rural Southwest Virginia provides one example of an area where service from both municipal and private entities is necessary to achieve the economic development goals of the Telecommunications Act.

"Showcasing Southwest Virginia," the effort to attract new employers and businesses to Southwest Virginia, has been a full-time, daily priority for Congressman Boucher throughout his tenure as a member of the House of Representatives. Congressman Boucher has worked continuously to promote the improvement of telecommunications services available to customers in Southwest Virginia. Despite the progress that has been made in many parts of the Ninth District, limitations on the availability of advanced telecommunications services have constrained the ability of Southwest Virginia to attract new employers and make the most of the region's potential for economic development. Businesses and consumers increasingly require high bandwidth connections that remain unavailable in many areas of Southwest Virginia.

Congressman Boucher has consistently viewed the 1996 Telecommunications Act from the time of its passage as a remedial measure which addressed the telecommunications needs of Southwest Virginia. Shortly before the final vote on the Act in February 1996, Congressman Boucher launched his "Electronic Village" initiative, with the goal that every town, county, and city in the Ninth District of Virginia would acquire "electronic village" capability for high speed computer-based communications similar to the Blacksburg Electronic Village. At almost the same time, Congressman Boucher announced the launch of the fiber-optic network in the Town of Abingdon, which was planned from the beginning to provide service to both government and private customers.[5]

In subsequent years, Congressman Boucher has often repeated his understanding that the protections against barriers to entry in the 1996 Telecommunications Act extend to local governments. Congressman Boucher has written formally to the Federal Communications Commission, expressing his understanding of the meaning of section 253(a). In addition, Congressman Boucher has restated the same views in public speeches, such as the Wise County forum in October 20, 2000, letters to and informal talks with Commission members,[6] and statements to the media, such as in an article published in Washington Techway news magazine. *See* Usher, *High-speed deliverance: Are phone companies using their clout to*

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[5] *See* generally http://www.house.gov/boucher/docs/eva.htm.

[6] *See* Letter of Congressman Boucher to Chairman Kennard, Mar. 16, 1999, *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi? native or pdf= pdf&id document=6008346222 (Attachment F).

keep rural Virginia from getting wired?, Washington Techway (Mar. 26, 2001).

Since the decision of the U.S. District Court for the Western District of Virginia in *City of Bristol v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001), and with the support of new laws from the Virginia General Assembly, a number of localities, including the City of Bristol itself, have begun telecommunications projects in Southwest Virginia. In May of 2003, Congressmen Boucher announced an award of federal funding which will enable the deployment of a fiber optic backbone for high speed Internet access in Russell and Tazewell Counties, areas which were previously unserved or underserved.

As demonstrated by the cooperative project between the City of Bristol and the Cumberland Plateau Planning District, local governments are working together in Southwest Virginia to find solutions to the lack of availability of advanced telecommunications. The return on investment for these projects can only be measured in the economic future of the region. The policies of the Telecommunications Act are being served when local governments are allowed to proceed with these projects to provide opportunities for Southwest Virginians, opportunities without which the task of achieving growth and opportunity in this area would become far more challenging.

The experience of Southwest Virginia demonstrates both the need and the potential for expansion of telecommunications services to create economic opportunities. Congress has determined in the exercise of its power to regulate interstate commerce that the availability of telecommunications services is too important to allow state law to limit which entities may provide telecommunications services. Failure

to allow local governments protection against state law barriers to entry into the telecommunications business defeats the plain language of Congress and the fundamental purposes of the 1996 Telecommunications Act.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES

Attorney General State of Missouri,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents,

Federal Communications Commission
and the United States of America,
Petitioners,

v.

Missouri Municipal League, *et al.*
Respondents,

Southwestern Bell Telephone Company,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The City of Abilene, Texas ("Abilene" or "City") and the Texas Coalition of Cities for Utility Issues ("TCCFUI") (together "*Amici*") respectfully submit this Brief *Amici Curiae* in support of Respondents.[1] Abilene and TCCFUI urge affirmation of the Eighth Circuit's decision.

INTEREST OF *AMICI CURIAE*

The City of Abilene, Texas is a "home rule city" under the Constitution and laws of the State of Texas with a population of approximately 116,000. Abilene is located 120 miles west of Fort Worth, Texas, the closest major metropolitan area. It is Abilene's August 15, 1996, petition for preemption to the Federal Communications Commission ("FCC" or "Commission") which is the subject of *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999). Accordingly, Abilene offers firsthand experience in how the D.C. Circuit's opinion thwarts Congress' determination that the nation's telecommunications needs are best served through competition. Abilene's interest is, and always has been, to ensure that its citizens and businesses have access to technologically-advanced telecommunications services.

TCCFUI[2] is a coalition of approximately 110 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. TCCFUI monitors the activities of the Texas Legislature, the Public Utility Commission of Texas, the Texas Railroad Commission, and the Federal Communications Commission on utility issues of importance to cities. One of the principal purposes of TCCFUI is to ensure that the citizens of Texas enjoy quality

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[1] No person or entity other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief and letters of consent have been filed with the Clerk of the Court.

[2] A list of TCCFUI's member cities is found on Attachment A.

utility service, including telecommunications services. Members of TCCFUI compete nationally and internationally for business development. TCCFUI members understand that up-to-date telecommunications service is essential to the efficient provision of municipal services, economic development, the ability to provide progressive educational and employment opportunities, and to achieve a high quality of life. Many members of TCCFUI own and operate an electric system and are in a perfect position to provide telecommunications services. TCCFUI supports the efforts of Abilene and similarly-situated municipalities to bring the benefits of competition in the telecommunications arena to all Americans.

SUMMARY OF THE ARGUMENT

This case is about whether the laudable purposes of the Telecommunications Act of 1996 ("the 1996 Act") will be accomplished and whether ***all*** Americans will enjoy the benefits of competition in the telecommunications field as envisioned by Congress. The Missouri statute at issue, like that enacted in Texas, does nothing less than protect the incumbent local exchange company by banning entry of potential competitors. In many instances, without participation by the local government, there will be no lower prices, upgraded infrastructure, or innovation typically associated with competition. Especially vulnerable are smaller, rural communities. The "digital divide" between rural and urban areas is quite real. The Court's decision in this case will either close that gap or widen the divide.

The Eighth Circuit's construction of Section 253(a) of the 1996 Act promotes competition in the telecommunications market and results in the deployment of advanced telecommunications services in those areas unserved or under-served by private companies by allowing local governments to identify the community's telecommunications needs and provide the necessary investment to meet those needs. In those states without comprehensive bans on local participation, hundreds of cities and towns are planning and working to modernize systems and provide the same communication services enjoyed by residents and businesses in larger, urban areas.

In contrast, the results are in on the D.C. Circuit Court's opinion in *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999), upholding the Texas law

preventing municipalities from competing in the telecommunications field. Abilene and other Texas cities can only watch as communities in other states upgrade their telecommunications infrastructure and surge ahead in the fierce competition for businesses and commerce. Abilene's vision for an up-to-date telecommunications system was dashed by the D.C. Circuit Court's opinion.

The importance of a modern telecommunications system to a community, ignored by the D.C. Circuit, cannot be overstated. The availability of enhanced telecommunications services is essential to the provision of municipal services and to the economic viability of a community. States and municipalities often compete for industry and business. Business location decisions may be determined by whether there exists an up-to-date telecommunications infrastructure and by the quality of the local educational system. The educational system of the community may be judged on whether enhanced telecommunications services are available in the schools. With the current emphasis on security and emergency preparedness, the essential nature of modern telecommunications goes beyond economics.

History teaches us that public entities can be critical players in the provision of essential services. Early in the development of the electric utility industry, the for-profit companies concentrated on bringing the miracle of electricity to the profitable urban areas of the United States. For nearly half a century, the rural areas of our country were literally left in the dark by the private companies. Only through the formation of local member-owned cooperatives and municipally-owned electric systems was this essential service brought to the small cities and towns, farms, and ranches of America. Congress, in promulgating the 1996 Act, was well aware of the history of the electric industry and perfectly understood the important role local governments can play in bringing enhanced telecommunications services to smaller towns and rural areas.

Surely, Congress intended that ***all*** Americans benefit from the competition promoted in the Telecommunications Act of 1996. Affirmation of the Eighth Circuit's decision will bring that goal closer to reality for all Americans.

ARGUMENT

I. Petitioners' Interpretation Of The Telecommunications Act Of 1996 Ensures That Many Americans Will Not Enjoy The Benefits Of Competition Envisioned By Congress.

A. The 1996 Act Promotes Competition.

The purpose of the Telecommunications Act of 1996 is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies."[3] The FCC has correctly stated the overriding goals of the Act:

> In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.
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> * * *
>
> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets.* The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.*[4]

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) codified at 47 U.S.C. § 157 (2000).

Amici agree with the FCC that Congress intended to promote competition in all telecommunications markets. The opening of all markets to all providers was the fundamental intent of Congress. But state laws restricting public providers from entry as competitors ensures that these goals will not be accomplished. Soon, eight years will have passed since the 1996 Act was signed into law on February 8, 1996. For many Americans, lower telecommunications prices, increased innovation, and deployment of advanced technologies remain but a dream. It is easy to see that in those states that have banned municipal entry into the marketplace, including Texas and Missouri, Congress' goals will not be realized.

It cannot be legitimately disputed that there exists what has been referred to as a "digital divide" between densely populated urban areas and sparsely populated rural areas in the availability of advanced telecommunications services.[5] The cause for such divide is not at all complicated. It is a matter of economics. Incumbent and competitive local exchange companies must anticipate a target rate of return before investment in expensive infrastructure is undertaken. Smaller, rural towns oftentimes cannot provide the required return.[6] In those states where incumbent local exchange

[4] *In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶ 1 (rel. Aug. 8, 1996) (emphasis added).

[5] *See, e.g.,* Stamp, *Left Behind: The Lack of Advanced Telecommunications Services in Rural America and its Strain on Rural Communities—Policy Options for Closing the Digital Divide*, 7 Drake Journal of Agricultural Law 645 (2002).

[6] In its 1995 report to the Texas Legislature, the Texas PUC reported that "...there is little evidence of competition for the provision of most local telephone services in rural Texas. LECs supply the majority of all services. Evaluation of potential competition suggests that LECs will continue to have a similar degree of dominance in the near future." According to the PUC, "...competitors for most services have little incentive to provide services to rural Texas at this time. This is especially true given that the cost of providing service is more expensive in rural areas because of low population densities." 1995 Scope of Competition in Telecommunications Market Report at 44. *See also,* FCC Report on

companies have been protected by laws prohibiting municipalities from participating in the telecommunications market, there is no other option. Those urging affirmation of the D.C. Circuit Court of Appeals in *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999) fail to consider that opinion's adverse effect on competition and, therefore, on the economic development of communities located outside the large urban areas.

B. The D.C. Circuit's Decision Is Anti-Competitive.

The anti-competitive affect of the D.C. Court's opinion is now a matter of history. The experience of *amicus* Abilene, brings home the point. In 1995 the Mayor's Task Force on Technology was formed to explore the technological needs of Abilene. It was a broadly based committee comprised of local and regional governmental officials, citizens, civic organizations, leaders in education, and businesses. It was local government at its best. The mission of the Task Force was "[t]o assure Abilene's place on the Information Superhighway."[7] As a result of the work of the Mayor's Task Force, Abilene viewed the construction of a modern

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Deployment of Advanced Telecommunications, 1999, Statement of Chairman Kennard:

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is -- the network of our national community...We must always be looking for ways to remove barriers to investment and to promote competition. *I am particularly concerned about deployment in rural areas and in inner cities.* Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. *But today's Report suggests that in the very short term, demand for high bandwidth will really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.* (Emphasis added).

[7] Report of Mayor's Task Force on Technology, September 26, 1996.

telecommunications infrastructure as a pathway to the City's economic vitality, similar to the manner in which highways and roads in the past were considered the cornerstones for economic growth of a city. Abilene had a vision to "enrich the lives of all area citizens, businesses, governmental entities, and schools by empowering them to use world-wide knowledge bases."[8] Abilene's plan to upgrade the telecommunications infrastructure was to benefit schools, libraries, healthcare facilities, and businesses. The local exchange company, SWB, was not willing to undertake the needed improvements to meet the City's needs. The City was prepared to work with the private sector to design, install, and maintain state of the art facilities to meet these goals. But Texas law prevented Abilene's entry into the market and quashed any effort to contract with a private sector company. The D.C. Circuit upheld the FCC's refusal to preempt Texas' onerous statute.[9]

Petitioners would have this Court affirm the reasoning of the D.C. Circuit in *City of Abilene*. The most striking feature of the D.C. Circuit's opinion is its complete silence on the statutory objectives and congressional policies that furnish the context for this controversy. The Court in *City of Abilene* missed the big picture. It was too busy listening for Congress' "tone of voice"[10] to consider the broad, important objectives of the 1996 Act. Consequently, Abilene's efforts to provide modern technology for its citizens was frustrated and in most small towns, competition remains non-existent. Rates have not been lowered in many rural towns. There has been no investment in an upgraded infrastructure in many cities and towns. Affirmation of *City of Abilene* means Congress' policies will not be implemented and its goals will remain out of reach.

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[8] *Id.*

[9] It should be noted that the D.C. Court failed to take into consideration that PURA 95 is to be construed "...so as not to conflict with any authority of the United States." PURA 95, § 1.406.

[10] *City of Abilene v. Fed. Communications Comm'n* at 52.

C. PURA 95 Is A Barrier To Competition.

In 1995, Texas enacted legislation purportedly designed to promote competition in telecommunications. The Public Utility Regulatory Act of 1995[11] ("PURA 95") announced that:

> ...it is the policy of this state to promote diversity of providers and interconnectivity and to encourage a fully competitive telecommunications marketplace while protecting and maintaining the wide availability of high quality, interoperable standards based telecommunications services at affordable rates...[12]

The Texas Legislature said it desired to "...foster, encourage, and accelerate the continuing development and emergence of a competitive and advanced telecommunications environment and infrastructure."[13] However, at the urging of politically powerful Southwestern Bell Telephone Company, one of the Petitioners in the instant case and the incumbent local exchange company in Abilene, the Legislature incongruously inserted a provision intended to protect Southwestern Bell from competition:

> Sec. 3.251
>
> (d) A municipality may not receive a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority under this Act. In addition, a municipality or municipal electric system may not offer for sale to the public, either directly or indirectly through a telecommunications provider, a service for

[11] The Public Utility Regulatory Act has been extensively modified over the years. The sections of PURA 95 of interest to us here are: § 3.001 (Act of May 12, 1995, 74th Leg., R.S., Ch. 231, § 7, 1995 Tex. Gen. Laws 2018 repealed by Act of May 8, 1997, 75th Leg. R.S., Ch. 166, § 1, 1997 Tex. Gen Laws 792); and § 3.251 (Act of May 12, 1995, 74th Leg., R.S., Ch. 231, § 23, 1995 Tex. Gen. Laws 2032 repealed by Act of May 8, 1997, 75th Leg., R.S., Ch. 166, § 1, 1997 Tex. Gen. Laws 828).

[12] PURA 95, § 3.001.

[13] *Id.*

> which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.[14]

The Texas statute, similar to the Missouri statute at issue, provides for a blanket prohibition against entry into the telecommunications market by private corporations in two respects. First, the Texas statute denies municipalities the opportunity to contract with for-profit corporations to provide telecommunications services to a city and its citizens. Second, the statute does away with a city's ability to act in the same manner as a private corporation in performing the proprietary function of providing telephone service.

Abilene believed the Texas statutory provision to run afoul of § 253 of the 1996 Act, considered itself to be an "entity" and petitioned the FCC for an order to that effect. At the same time it was considering Abilene's petition, the FCC also had before it the petition of ICG Communications ("ICG"), a Denver-based private company providing telecommunications services.[15] ICG, too, sought a declaratory order preempting the Texas statute. ICG had entered into a joint venture with the City of San Antonio, Texas, to construct a telecommunications network. A portion of the network was to be used by the City for purposes of its electric utility and the balance was to provide telecommunications services for sale to the public. It seemed to be the perfect blend of government and private business which would make efficient use of San Antonio's facilities while bringing advanced telecommunications services to the residents and businesses of San Antonio.[16]

[14] PURA 95, § 3.251(d). This section is now codified in PURA §§ 54.201 and 54.202 (Vernon 1998).

[15] *Petition for Expedited Declaratory Ruling Regarding the Validity of Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995 Prohibiting Provision of Telecommunication Services by Municipalities*, CCB Pol 96-14 (May 20, 1996).

[16] In the *Abilene* case, the City of Garland, Texas pointed out to the FCC that 75 municipalities in Texas own and operate their own electric utility and provide retail electric service to over 2.5 million Texans. Garland

But, the Texas Attorney General rendered an opinion that the San Antonio-ICG agreement was prohibited by § 3.251(d), PURA 95. The Attorney General all but admitted that stifling competition was the prime motivation in adoption of the Texas statute by quoting the sponsor of § 3.251(d):

> Members, right now, cities are in the business of regulating these utilities. They own the rights-of-way. Franchise fees are paid to them. We don't think it . . . fair for them to be able to also enter into the businesses.[17]

Even if this Court amends 47 U.S.C. § 253(a) to read "any *private* entity" as requested by Petitioners, the Texas statute has already prevented the provision of telecommunications services by a private entity, ICG.

Not only is the Texas ban anti-competitive, it is based on a misunderstanding of Texas and federal law. Regulation of the right-of-way and promulgation of franchise fees does not create the "unfair" situation feared by the bill's sponsor. While municipalities certainly do have authority to manage the public right-of-way and collect franchise fees, such authority is subject to

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contended that many of these cities are "uniquely positioned to enter into the field of telecommunications services, either as direct providers or in partnership with providers." FCC, CCB Pol 96-19, *Comments of City of Garland, Texas in Support of Petition of City of Abilene, Texas for Expedited Declaratory Ruling* (Oct. 10, 1996) at 3.

[17] Debate on H.B. 2128, on the floor of the Senate, 74th Leg. R.S. (May 12, 1995), Statement of Senator Sibley quoted in Op. Tex. Att'y Gen. No. DM-391 (1996). This asserted "conflict of interest" ignores the fact that municipalities in Texas were authorized, for decades, to provide telecommunications services and charge franchise fees to competing telephone companies. Article 1175(13), Vernon's Art. Civ. Stat. Numerous municipalities in Texas own and operate electric systems that compete with investor-owned electric utilities while retaining the ability to assess franchise fees on competing firms. No court has determined this arrangement to be a conflict of interest. There is no danger that the provision of telephone service by a city will result in a monopoly as the Texas Constitution prohibits such monopolies. Vernon's Ann. Tex. Const. Art. I, § 26 ("monopolies are contrary to a free government, and shall never be allowed...").

both Texas and federal non-discrimination requirements. Cities are to apply right-of-way regulations and collect fees in a competitively neutral manner.[18] The FCC correctly ruled in the *Abilene* proceeding that the issue of the regulator becoming a competitor "can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition."[19]

Moreover, the Texas statute prohibits entry of municipalities into the telecommunications market even when such municipalities are acting as private corporations. Most cities and towns in Texas with populations exceeding 5,000 are "home rule" cities created under the Home Rule Amendment to the Texas Constitution.[20] A home rule city is authorized by the State Constitution to amend its charter in any manner, consistent with the Constitution and the general laws of Texas. A home rule city need not look to the Legislature for a grant of power to act because such power is provided by the Constitution.[21]

In Texas, the functions of a city are considered governmental or proprietary.[22] A governmental function is legislative in nature and may not be delegated or bartered away.[23] There are no similar restrictions an proprietary functions:

> In the exercise of its proprietary or business functions, however, such as those which it exercises when it enters into a contract for the

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[18] *See,* the 1996 Act, 47 U.S.C. § 253(c); TEX. LOCAL GOV'T CODE § 283.001(c) (Vernon Supp. 2003); *AT&T Communications of the Southwest v. City of Dallas, Tx.*, 8 F. Supp. 2d 582, 586 (N.D. Tex. 1998), *vacated on other grounds*, 243 F.3d 928 (5th Cir. 2001) (city without authority to impose conditions unrelated to telecommunications providers' use of the city's rights-of-way); *AT&T Communications of the Southwest, Inc. v. City of Austin, Tx.*, 975 F. Supp. 928 (W.D. Tex. 1997).

[19] *In the Matter of City of Abilene*, FCC 97-346, Order at §190 (Oct. 1, 1997).

[20] Vernon's Ann. Tex. Const. Art. XI, §5 (Vernon 1993).

[21] *Rose v. City of La Porte*, 386 S.W.2d 782, 785 (Tex. 1965).

[22] *See, City of Crosbyton v. Texas-New Mexico Utilities Co.*, 157 S.W.2d 418, 420 (Tex. Civ. App.-1941, writ ref'd w.o.m.); *see also, City of Robstown v. Barrera*, 779 S.W.2d 83, 85 (Tex. App.-Corpus Christi 1989, no writ).

[23] *City of Crosbyton* at 420.

> private interests of its own inhabitants or of itself, a municipal corporation is limited by no such restriction. ***It is at liberty to exercise these powers in the same way and to the same extent as individuals or private corporations*** and it is settled by a long line of decisions of the courts of this state that the ownership and operation of public utilities, such as . . . electric light plants . . . ***is not a governmental function but is proprietary in its nature and constitutes a business or corporate function of the city***.[24]

Today in Texas, the provision of public utility service by a municipality remains a proprietary or corporate function.[25] There is no doubt that the Texas Legislature is entitled to restrict or prohibit the powers of its political subdivisions. Here, however, the restrictions on a city's ability to provide telecommunications services have the same effect as restrictions on private entities.

The Texas Comptroller of Public Accounts, in a 2003 report, linked telecommunications services and economic development, declaring Texas' ban on municipalities and municipal electric companies an impediment to development of modern telecommunications services.[26] The Comptroller noted that "local telecommunications providers have demonstrated an apparent lack of interest because of legitimate concerns of profitability."[27] The Texas PUC recognizes that due to the comprehensive prohibition on local government from providing telecommunications services, "in a rural area if the ILEC does not initiate rollout of advanced services, rural residents may be challenged to find an alternate provider."[28] The PUC recommended a "narrow exception" that would allow rural municipal governments to build their own telecommunications

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[24] *Id.* (emphasis added).

[25] TEX. CIV. PRAC. & REM. CODE ANN., § 101.0215 (Vernon Supp. 2003).

[26] Carol Keeton Strayhorn, Texas Comptroller of Public Accounts, *Limited Government, Unlimited Opportunity*, "Increase the Availability of Broadband Interest Services in Rural Areas," at 2-4 (Jan. 2003).

[27] *Id.* at 4.

[28] Report to the 77th Texas Legislature, *Availability of Advanced Services in Rural and High Cost Areas*, Public Utility Comm'n of Texas, January 2001 at 69.

infrastructure and provide advanced services.[29] The PUC's suggestion went unheeded by the Legislature.

In the Texas PUC's report to the state Legislature in 2003, the plight of rural residents was made clear. The Texas Commission reported that as of June 30, 2002, incumbent local exchange companies still controlled 84% of the rural access lines.[30] Competitive local exchange companies "obtained more lines in urban areas, primarily in downtown and other business districts. This could be attributed to high investment costs and small customer bases in rural areas, resulting in smaller profit margins."[31] In many rural counties in Texas there are zero to few competitive local exchange company lines.[32] Similarly, there are numerous Texas counties that have a single or no broadband provider.[33] SBC's goal of providing DSL service to 80% of its customers based in Texas has been scaled back to 58% and the Company "announced a further slow down in towns with lower population densities."[34] As of the fourth quarter of 2001, 94% of SBC's DSL deployment in Texas is in urban areas.[35]

The Congress of the United States has determined that the nation's telecommunications needs are best served through competition. To ensure real competition, Congress has provided that a state may not prohibit "any entity" from providing telecommunications services. Missouri, Texas and others, however, have restricted competition by prohibiting public entities from providing such services. Petitioners' briefs, as well as those that support Petitioners, are eerily silent on the question of who is going to serve in those areas where the profit incentive is absent. Adoption of Petitioners' suggested interpretation of the 1996 Act ensures that lower prices, higher quality service, and the rapid deployment of technologically-advanced services will remain out of the grasp of many Americans.

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[29] *Id.*

[30] Report to the 78th Texas Legislature, *Scope of Competition in Telecommunications Markets of Texas*, Public Utility Comm'n of Texas, January 2003 at 24.

[31] *Id.* at 25.

[32] *Id.* at 26.

[33] *Id.* at 33, Fig. 20.

[34] *Id.* at 35.

[35] *Id.*

II. The Participation of Local Governments Can Realize Congress' Goal Of True Competition.

A. The Experience Of the Electric Utility Industry Is Instructive.

Petitioners could use a history lesson. It is an incredible American success story that the availability of reliable, affordable electric energy "changed the very fabric of every day life on the farms and ranches of rural America."[36] Universal electric service would never have developed on a timely basis without the development of municipally-owned systems and the creation of rural electric coops.

The development of the telecommunications industry is startlingly similar to that of the electric utility industry. American cities began enjoying the benefits of electric power soon after Thomas Edison started operating the first central station electric system in New York City in 1882.[37] However, the privately-owned utilities restricted service to larger cities, commercial businesses, and wealthy individuals.[38] Consequently, by 1890 more than 150 towns operated their own power systems.[39] Early consumer-owned systems often charged half the price of the private companies so that "common people gained access to the miracle of electric lights, while in the other cities only the wealthy could afford to switch from traditional gas or kerosene lamps, or commercial businesses faced higher prices."[40]

Gaps in service by the IOUs were filled by municipal systems in the large cities, as well. Detroit, for example, formed its own system to serve stores and homes of common people, charging prices 50% lower than the private company.[41] Interestingly, it was the leaders of the private electric utilities that

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[36] *People—Their Power, The Rural Electric Fact Book*, National Rural Electric Cooperative Association at 1-2 (1980).
[37] *Id.* at 4.
[38] R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* at 32-38 (1986).
[39] *American Public Power Association: A History* at 2.
[40] *Power Struggle* at 32.
[41] *Id.* at 32-38.

opposed free enterprise and competition and proposed that franchises be granted to single entities.[42]

Rural Americans were kept in the dark for nearly half a century:

> As late as the mid-1930s, nine out of ten rural homes were without electric service. The farmer milked his cows by hand in the dim light of a kerosene lantern. His wife was a slave to the wood range and washboard. The children pumped water by hand from a well in the yard and carried it into the house and barn by the bucketful. Ice cut from a pond in winter and stored underground was the only means for keeping food fresh. Outdoor privies were standard 'conveniences' for rural living, and they were a health hazard.
>
> If the 'good old days' of rural life four decades or more ago are remembered with some nostalgia, they also should be remembered for their primitive conditions and the burden of hand chores which had changed but little since Colonial times.
>
> The unavailability of electricity in rural areas kept their economies tied entirely and exclusively to agriculture. Factories and business, of course, preferred to locate in the cities where electric power was easily acquired. If a rural person wanted more income than farming offered, he had no choice but to move to the city – because that's where the jobs were.[43]

President Roosevelt issued Executive Order 7037 on May 11, 1935 establishing the Rural Electrification Administration and on May 20, 1936, the Rural Electrification Act of 1936 was signed into law establishing the Rural Electrification Administration as the federal agency through which low interest loans would be made available for the construction of necessary infrastructure. Only when private utilities failed to take advantage of the loan

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[42] *Id.* at 38-42.
[43] *People—Their Power* at 4.

opportunities was the formation of electric cooperatives encouraged.[44]

Not surprisingly, huge areas of Texas had gone unserved by the for-profit electric companies. Today, 65 rural electric distribution cooperatives in Texas with more than 296,000 miles of lines provide service to 1.5 million meters in 240 of Texas' 254 counties. As previously noted, it was reported to the FCC that 75 towns and cities in Texas own and operate their own electric utility or electric distribution system serving 2.5 million Texans. Local participation has meant reliable service and lower rates. The electric rates charged by electric cooperatives and municipally-owned electric systems in Texas are lower than almost all rates charged by the investor-owned utilities (IOUs):

[44] *Id.*

Average Bill Comparison[45]

June 2003 – Residential – 1,000 kWh

Central Power & Light (IOU)	$110.33
Texas-New Mexico Power (IOU)	$107.62
West Texas Utilities (IOU)	$107.33
El Paso Electric (IOU)	$104.97
CenterPoint (Houston) (IOU)	$101.46
TXU (Dallas) (IOU)	$100.72
Tri-County EC (Coop)	$96.25
CPS (San Antonio) (Muni)	$93.81
San Patricio EC (Coop)	$90.86
Entergy Gulf States (IOU)	$90.60
Nueces EC (Coop)	$87.14
Magic Valley EC (Coop)	$82.47
Austin Energy (City of Austin) (Muni)	$80.59
South Plains EC (Coop)	$77.20
Victoria EC (Coop)	$76.42
Kerrville PUB (Muni)	$72.19
Southwestern Electric Power (IOU)	$72.18
Guadalupe Valley EC (Coop)	$71.57
Bluebonnet EC (Coop)	$69.50
City of San Marcos (Muni)	$69.23
Southwestern Public Service (IOU)	$65.69
Upshur-Rural EC (Coop)	$63.95

Public participation in the provision of electricity through electric coops and municipally-owned systems is an unqualified success in Texas and throughout the United States. Local governments have ensured the provision of reliable, low cost power in areas where the private companies would not serve. The

[45] Sources: Public Utility Commission of Texas and City of Austin, d/b/a Austin Energy.

Missouri and Texas laws banning municipalities from providing telecommunications services where others refuse to serve prevents a similar success story in the telecommunications arena.

Today, the cavalier attitude of the early electric power industry is shocking. The electric industry viewed electrification as "a series of markets that could best be exploited in a particular sequence."[46] In a July 1935 report, utility company executives asserted that "there are very few farms requiring electricity for major farm operations that are not now served."[47]

This same "let them eat cake" attitude prevails today among the incumbent telephone companies. When the Mayor's Task Force in Abilene brought government, business, and educational leaders together to identify and plan for the advanced telecommunications system necessary to allow Abilene to grow, prosper, and compete, the incumbent telephone company simply said "no." Southwestern Bell decided that its network "...meets the needs of the Abilene community today and will tomorrow."[48] When Abilene appealed to the FCC for preemption so it could help itself, SWB arrogantly informed the FCC that it had already invested sufficient sums in Abilene.[49] It is more than ironic that Southwestern Bell, which refused to provide the infrastructure Abilene's government, education and business leaders determined would be necessary, is now before this Court arguing that cities and towns should go without before public entities should be allowed to fill in the digital divide.[50] SWB's position would make the electric utility executives of the 1930's proud.

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[46] D. Nye, *Electrifying America* at 26-27 (1990).

[47] *People, Their Power* at 7.

[48] SWB Regional President letter to the Abilene Mayor at 2 (Oct. 23, 1996).

[49] *In the Matter of City of Abilene*, FCC 97-346, SWB Comments at 5.

[50] SWB's goal is not competition but protection from competition. It has established a reputation for obstructing competition. In 1998, Consumers Union and the Consumer Federation of America urged the FCC to block a proposed merger between SBC and Ameritech. These groups warned of Southwestern Bell's "particularly bad record on local competition." *See,* Consumers Union Press Release, October 15, 1998. As late as 1998, "...competitors have taken less than 1 percent of the market from the Bell." *Id.* According to Consumers Union, "they have thrown every barrier imaginable to competition, in particular with SBC earning a

B. Congress Understood The Ability And Desire Of Local Governments To Participate In Competition.

One of the principal issues in the U.S. Presidential election in 1932 was the provision of electricity. Soon-to-be President Roosevelt knew the importance of local governments to real choice and lower rates:

> [W]here a community -- a city, or a county, or a district -- is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basis right, as one of its functions of government ... to set up ... its own governmentally owned and operated service. ... [t]he very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a 'birch rod' in the cupboard, to be taken out and used only when the 'child' gets beyond the point where more scolding does no good.[51]

Clearly, Congress was aware of the history of the electric industry when enacting the 1996 Act. Congress, too, understood

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national reputation as the Baby Bell most hostile to competitors." *Id.* Texas Public Utility Commissioners bemoaned Southwestern Bell's "lack of cooperation with customers and evidence of behavior which obstructs competitive entry." Transcript of Open Meeting, May 21, 1998, pages 186-208. The Texas Commission denied SWB's request to enter the long distance market based on the fact that competitors had captured only a "miniscule" number of business and residential customers in Texas. *Id.* Two of the Commissioners called for SWB to fundamentally change its corporate culture from the top to bottom. *Id.* SBC Communication was fined $6 million by the FCC for "willfully and repeatedly" failing to give competitors full access to its networks. *See,* San Antonio Express-News, October 10, 2002.

[51] Franklin Delano Roosevelt, campaign address on public utilities and development of hydro-electric power, delivered in Portland, Oregon, Sept. 21, 1932.

that local governments are uniquely positioned to enter the competitive market. Congress most certainly had knowledge of the benefits public entities could bring by filling in the gap in competition. Congress has seen that public participation lowers rates and enhances services. In this context, it is easy to see why Congress used the phrase "any entity" rather than "any private entity."

There is no doubt that entry into the telecommunications field by municipalities and municipally-owned electric utilities would promote competition and help meet the objectives of Congress.[52] The FCC admitted that to be the case in the *Abilene*

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[52] In those states without comprehensive bans on municipalities, the small cities are taking charge. *See,* Testimony of William J. Ray on Behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351, 355-356 (1994). Glasgow, Kentucky's 13,000 residents have a choice of telephone service from GTE or Glasgow Electric. "The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system." As a result of the public system, the private cable TV company "decided to drop its rates by roughly 50 percent and improve its service, too." On Sept. 26, 2003, the American Public Power Association and Fiber-to-the-Home (FTTH) Council presented a briefing to Congress in which local authorities from places such as Provo, Utah, Bristol, Virginia, and Kutztown, Pennsylvania reported that public utility departments were offering a wide variety of telecommunications services. As a result, tech-oriented businesses were considering establishing operations in their communities. Kutztown's utility department took over the fiber loop when no private company showed an interest and the city provides cable TV, telephone and FTTH services. *See,* Telecommunications Reports Daily, *Officials: Broadband Investments Pay Off for Localities* (Sept. 26, 2003); www.tr.com. In the State of Washington, the City of Cheney has installed fiber-to-the-home technology to its residents and businesses causing the mayor to declare that "high-bandwidth services to our citizens helps us attract new businesses, create new jobs, and ensure our residents have access to broadband services enabled by FTTH technology." *See,* Light Reading-Networking the Telecom Industry, *FTTH Council Applauds Supremes* (June 25, 2003); www.lightreading.com. According to the Fiber-to-the-Home Council, 94 communities in 26 states have access to fiber to home with municipalities becoming the "feature players

proceeding: "[M]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services."[53] In the case at bar, the FCC concedes again that, "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities."[54]

The lessons of history are ignored at one's peril.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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in North America's fiber rollout agenda," including 80 local governments in Ohio providing broadband or cable service by their utility departments. *See,* Broadband Reports.com, *Bells Absent (so far) in Fiber Push* (Oct. 7, 2003).

[53] *In the Matter of City of Abilene*, FCC 97-346, Order at §190 (Oct. 1, 1997).

[54] *Brief for the Federal Petitioners* at 7.

Abernathy
Addison
Alamo
Allen
Andrews
Arlington
Austin
Balcones Heights
Belton
Big Spring
Bowie
Breckenridge
Brenham
Brookside Village
Brownfield
Brownwood
Buffalo
Burkburnett
Canyon
Carrollton
Cedar Hill
Center
Cisco
Clear Lake Shores
Cleburne
College Station
Conroe
Corpus Christi
Cottonwood Shores
Crockett
Dallas
Denison
Dickinson
El Lago
Electra
Fairview
Flower Mound
Fort Worth
Fredericksburg
Friendswood
Georgetown
Grand Prairie
Grapevine
Greenville
Gregory
Groves
Harlingen
Henrietta
Hewitt
Huntsville
Irving
Jacinto City
Jamaica Beach
Kilgore
LaGrange
La Joya
Lampasas
Lancaster
Laredo
League City
Levelland
Lewisville
Longview
Los Fresnos
McAllen
Mexia
Midlothian
Missouri City
Navasota
Nolanville
North Richland Hills
Palacios
Pampa
Paris
Pearsall
Plainview
Plano
Port Neches
Ralls
Refugio
Reno
Richardson
River Oaks
Rosenberg
San Marcos
San Saba
Selma
Seminole
Seymour
Smithville
Snyder
South Padre Island
Spearman

Stephenville
Sugar Land
Sunset Valley
Taylor Lake Village
Terrell
The Colony
Thompsons
Timpson
Town of Westlake
Trophy Club
Tyler
University Park
Victoria
Waxahachie
Webster

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, *et al.*,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF KNOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Knology, Inc. ("Knology") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

Knology, one of a growing number of competitive providers of telecommunications services, owes its existence to the pro-competition provisions of the Telecommunications Act of 1996 ("Act"). Because Knology has a vital interest in the Act's core goal of opening telecommunications markets to competition, it also opposes the attempt by Petitioners and their *amici* to undermine that goal.

Knology provides telecommunications services to more than 125,000 residential and business customers in eight markets across the southeastern United States.[2] It provides these services as part of a "bundle" of communications offerings that includes cable television service and high speed Internet access. Knology delivers these services through interactive broadband networks employing state-of-the-art fiber optic technology.

In each of its markets, Knology competes with incumbent telephone companies and cable operators. Before Knology entered those markets, those incumbent service providers enjoyed monopolies. To protect those monopolies, they employed a variety of tactics to prevent, delay or increase the cost of Knology's entry. *See, e.g., Knology v. Insight Communications Co.*, 2001 WL 1750839 (W.D. Ky.

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[1] Pursuant to rule, the consents of both the Petitioners and the Respondents have been obtained and filed with the Clerk of the Court. No counsel for either party has authored this brief, in whole or in part, and no person other than Knology has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

[2] Knology's markets include Huntsville and Montgomery, Alabama; Panama City, Florida; Augusta, Columbus, and West Point, Georgia; Charleston, South Carolina; and Knoxville, Tennessee.

Mar. 20, 2001) (challenging anticompetitive franchise provision forced on Knology by incumbent cable provider); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, F.C.C. 02-338 (Dec. 31, 2002), ¶¶ 108-111 (detailing predatory pricing and other tactics used by incumbents to deter entry by competitors) (hereinafter "*FCC Annual Assessment*"). In addition, as the second entrant in each market, and as one of several providers of high speed Internet access, Knology generally has fewer customers than its competitors. Only by combining revenues from its bundled service offerings – telephone, internet, and cable television – can Knology maintain its financial viability.

Knology has used joint ventures with public utilities as a vehicle for entering new markets. For example, a Knology subsidiary in Newnan, Georgia offers telephone service, cable television, and Internet access through a fiber network built by Newnan Utilities, a municipally-owned entity that also provides power and water service. Knology contemplates entering into similar ventures with municipal utilities in the future.

In addition, Knology is a member of the National Cable Television Cooperative ("NCTC"), which acts as Knology's agent in acquiring rights to the video programming that Knology includes in its "bundle." The NCTC negotiates rates for that programming with satellite and broadcast programming vendors based on the combined subscriber numbers of its members. Many other competitive broadband service providers are members of the NCTC, including both private and municipally owned entities. The combined subscriber numbers of these concerns enable them to achieve economies that at least partially offset the advantage of scale enjoyed by their incumbent rivals.

Affirmance of the decision below will preserve the ability of local governments and competitive broadband providers to bring competition to the telecommunications marketplace. The Act broadly bars state and local

governments from prohibiting "any entity" from providing telecommunications services. 47 U.S.C. § 253(a). Petitioners' challenge to that provision should be rejected because – in addition to the reasons articulated in Respondents' brief – (i) it would impair important First Amendment interests of Knology and consumers, (ii) it would create uncertainty about the Act's meaning and spawn considerable follow-on litigation, and (iii) it would give incumbent monopolists an additional tool for thwarting the Act's pro-competitive purpose. The Court should not rebuild barriers to competition that Congress so clearly dismantled.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed for several reasons.

First, Petitioners urge that a strained and implausible reading of § 253(a) is necessary to protect state autonomy. Although those federalism concerns do not support the judicial nullification of § 253(a), as set forth in Respondents' Brief, Petitioners ignore an important countervailing consideration: the outcome they seek would impair the First Amendment rights of Knology and other competitive broadband providers. These entities cannot effectively provide cable television services without offering telecommunications services, sometimes in joint arrangements with municipalities. If states could prohibit local governments from providing or offering telecommunications services, then the speech rights of broadband providers would be harmed. Moreover, Petitioners' rewriting of § 253(a) would implicate the speech rights of many others who otherwise would use internet and telephone services offered by municipal/broadband ventures. This Court should construe § 253(a) to avoid these constitutional deprivations.

Second, Petitioners' attempt to rewrite the statute would embroil the courts in sterile disputes about what kind of

municipal "entity" may be barred from providing telecommunications services. Congress adopted language that left no room for disputes about *which* entities a state might bar from the market: none may be barred. A holding that states may exclude *some* entities, however, would trigger extensive litigation over *which* entities may be so barred. The Act itself supplies no guidance for resolving such litigation, since it announces only that state and local governments may not restrict "any entity" from providing these services. If this Court were to ignore Congress' clear language, it would force courts to make a series of unguided policy guesses to resolve the subsequent litigation.

Finally, affirmance will directly promote competition, the primary objective of the Act. Petitioners' *amici* have long fought to throttle competition. Their arguments here seek the same end by blocking municipalities from establishing telecommunications systems that offer better service and lower prices. This Court should not permit the pro-competitive goal of the Act to be defeated.

ARGUMENT

I. THE COURT SHOULD NOT REWRITE THE ACT TO INFRINGE PROTECTED SPEECH.

Petitioners insist that, in order to preserve the states' authority over political subdivisions, the preemptive terms of § 253(a) should not be enforced. Petitioners cite *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for the proposition that Congress must be very clear about its intent to preempt state law in areas of traditional state authority. Fed. Pet. Br., at 12-25. Although the *Gregory* standard does not support the rewriting of § 253(a) sought by Petitioners, Petitioners also ignore an important countervailing consideration: rewriting § 253(a) would impair core First Amendment rights. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The speech interests imperiled by petitioners' arguments

counterbalance any federalism interests asserted by Petitioners.

Competitive broadband service providers offer telecommunications services in "bundles" that also include cable television and high speed internet access. Private broadband providers now serve more than one million customers in communities with more than 17 million homes, using more than 32,000 miles of fiber optic cable they installed for this purpose. *See FCC Annual Assessment* ¶ 105.

Some private broadband providers operate their networks as joint ventures with public utilities. Knology – which operates such a network in Newnan, Georgia, and anticipates entering into similar ventures in the future – is by no means unique in doing so. RCN, a private broadband service provider with more than 500,000 customers in numerous markets, offers bundled communications services in joint ventures with electric utilities in both Boston and Washington, D.C. *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 91-93 (1st Cir. 1999); *FCC Annual Assessment*, n. 345. Other competitive broadband service providers follow the same model in other markets. *Id.* ¶¶ 99-101.

A broadband provider that includes cable television service is a protected speaker under the First Amendment. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662-63 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). To exercise their speech rights, however, competitive broadband providers must offer not only cable television, but also telephone and Internet services. Without providing the full bundle of communications services, broadband providers can effectively provide none. *See FCC Annual Assessment*, ¶ 102. As a result, a significant avenue of competitive entry would be sealed off if the Act were rewritten so states could prevent local governments from providing telecommunications

services. That rewriting of the Act would immediately cancel the speech rights of broadband providers in joint ventures with municipal utilities.

In addition, competitive broadband providers supply internet and telephone services through which customers exercise their own First Amendment rights. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1996) (applying First Amendment protections to Internet transmissions); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, Inc., -- U.S. --, 123 S. Ct. 1829 (May 5, 2003) (same, for telephone solicitations for charities). If states can prevent municipalities from offering telecommunications services, customers will lose those facilities for communicating their speech.

These First Amendment interests offset any federalism-based justification that Petitioners may assert. As this Court held in another First Amendment context, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. The Court in that case refused to follow a statutory interpretation by the National Labor Relations Board that handbilling by union members represented illegal coercion under the National Labor Relations Act. Because the Board's interpretation threatened the First Amendment rights of union members, the Court construed the law not only to avoid the threatened constitutional deprivation, but also to accord due respect to Congress by assuming it did not intend "to infringe constitutionally protected liberties." 485 U.S. at 575. There is no justification for abridging speech interests by adopting the counter-textual statutory interpretation urged by Petitioners in this case.

Indeed, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), recognized that First Amendment interests may

outweigh state prerogatives afforded by the Constitution's federal structure. That decision held that the Twenty-First Amendment's grant of state power to regulate alcoholic beverages did not allow states "to ignore their obligations under other provisions of the Constitution." *Id.* at 516. In that case, First Amendment speech rights outweighed the state's constitutional powers. By similar reasoning, the Court should not rewrite the plain language of § 253(a) to vindicate state interests at the expense of constitutionally protected speech.

Even if Petitioners' professed federalism concerns could justify ignoring the plain language of § 253(a) – a highly doubtful proposition, for the reasons stated in Respondents' brief – those concerns cannot trump both Congress' plain intent and fundamental First Amendment interests that would thereby be impaired.

II. THE COURT SHOULD NOT CONSTRUE "ANY ENTITY" TO CREATE UNCERTAINTY ABOUT WHICH ENTITIES ARE WITHIN THE SCOPE OF THE ACT.

Petitioners ask this Court to rewrite the bar in § 253(a) against state or local limits on telecommunications offerings by "any entity." In effect, Petitioners argue that the statute may be applied only to prevent states from limiting telecommunications offerings by "entities other than municipal ones." By so muddying the categorical language of the statute, this Court would consign to continuing litigation, and the unguided policy choices of the courts, the congressional policy of opening telecommunications markets to competition.

Petitioners would leave the states free to bar municipal entities from providing telecommunications services. In applying this new version of the statute, however, the courts would have no guidance as to what types of "municipal entities" could be so prohibited. The absence of such guidance is not surprising, since Congress intended the

prohibition in § 253(a) to be categorical. Without any congressional guidance, the courts would have no reliable basis for distinguishing among the range of business models adopted by municipalities.

Municipalities may provide telecommunications services through many organizational arrangements: (i) directly through a public agency; (ii) through a municipally-owned corporation; (iii) by establishing public/private joint ventures, such as Knology's enterprise in Newnan, Georgia; (iv) by leasing municipal facilities to private operators; or (v) by other means. If this Court were to hold that "any entity" in § 253(a) really means "any entity except municipal ones," the courts would have to determine which organizational arrangements were so "municipal" as to fall within this judge-made exception. The resulting uncertainty and litigation would be exactly what Congress intended to avoid by using the categorical term "any entity."

These difficulties are apparent in the proceedings below. When the instant case was before the Federal Communications Commission, that agency concluded that Missouri could bar its municipalities from providing telecommunications services. *See In re Missouri Municipal League*, 2001 WL 28068, 16 F.C.C.R. 1157, 1158 (Jan 21, 2001). The Commission noted, however, that whether a state had power to impose such restrictions *could* turn on how municipalities organized their telecommunications ventures: if the municipal entities had provided telecommunications services through independent corporate entities, "we could reach a different result under section 253(a)." *Id.* at 1169. Although the Commission had no occasion to resolve that issue conclusively, it was unable to state whether, or how, the corporate form of the municipal provider would affect its status under the Act.

Entities such as the one hypothesized by the Commission already provide telecommunications services in different parts of the country. *See, e.g., Cablevision*, 184 F.3d at 91-93. If

this Court were to rewrite § 253(a) to exclude "certain municipal entities" from "any entity," then states, local governments and broadband providers would all be unsure of the statute's reach. Instead of resolving the issue, the Court's decision would sow confusion and lead to further litigation.

When a statute does not define a term, such as "any entity," the presumption must be that Congress intended the ordinary meaning of that term. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Here, "any entity" must include municipalities, which are entities as the word is normally used. Moreover, when considering two interpretations of a statute, the Court should prefer the one that relies on the language of the statute to determine its scope, rather than forcing the courts to do so through incremental litigation. *See, e.g., Lewis v. United States*, 523 U.S. 155, 175 (1998) (Scalia, J., concurring) ("I am skeptical of any interpretation which leaves a statute doing no real interpretive work in most of the hard cases which it was drafted to resolve.").

The statutory language plainly tells states which entities they may prohibit from entering the telecommunications market: none. This Court should reject Petitioners' efforts to force the courts to decide incrementally, and potentially inconsistently, which municipal entities may be barred.

III. ALLOWING THE TERM "ANY ENTITY" ITS PLAIN MEANING WILL FURTHER THE ACT'S GOAL OF PROMOTING COMPETITION.

Prior to the adoption of the Act, incumbent telecommunications monopolists used various means to exclude competitive providers from their markets, including intensive political action intended to bend the wills of state legislatures. In fact, the regulatory regime then in place "simply propped up *un*natural monopolies created by comfortable collaboration between government regulators and entrenched incumbents in a conspiracy against upstarts eager to compete." Peter W. Huber, Michael K. Kellogg, & John

Thorne, *Federal Telecommunications Law* 87 (Aspen Law & Business, 2d ed. 1999). Incumbent providers also took other anticompetitive actions against new entrants, such as preventing them from physically connecting with the incumbents' facilities in order to extend services to potential customers. *See Verizon Communications v. FCC*, 535 U.S. 467, 532 (2002).

Congress has recognized that the incumbents' monopolistic actions restrict competition. As one House Report noted, "local exchange carriers maintain control over the essential facilities needed for the provision of local telephone service... The inability of other service providers to gain access to these functions and capabilities inhibits competition that would otherwise develop in the local exchange market." H.R. Rep. No. 103-560, at 28, *available at* WL, 1994 A&P H.R. Rep. 103-560 (accompanying H.R. 3636, 103d Cong. (1994)).

The primary purpose of the 1996 Telecommunications Act was to end this era of state sponsored monopoly, and implement a new national policy to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies." Telecommunications Act of 1996, 100 Stat. 56 (1996). Knology and other private broadband service providers are the direct result of this new pro-competition policy, as are municipal broadband service providers and the various joint ventures between these private and public entities around the country.

Petitioners' *amici* are the same entities that fought competitive entry before the Act was adopted. Deprived of their former status as state sponsored monopolies, they now seek the same result by advancing the cause of state sovereignty. The Court should reject this tactic for regaining monopoly status and defeating the clear intent of Congress to open the nation's telecommunications markets to "any entity."

CONCLUSION

For these reasons, the Court should affirm the decision of the Eighth Circuit.

Respectfully submitted,

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